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TRANSCRIPT OF RECORD.

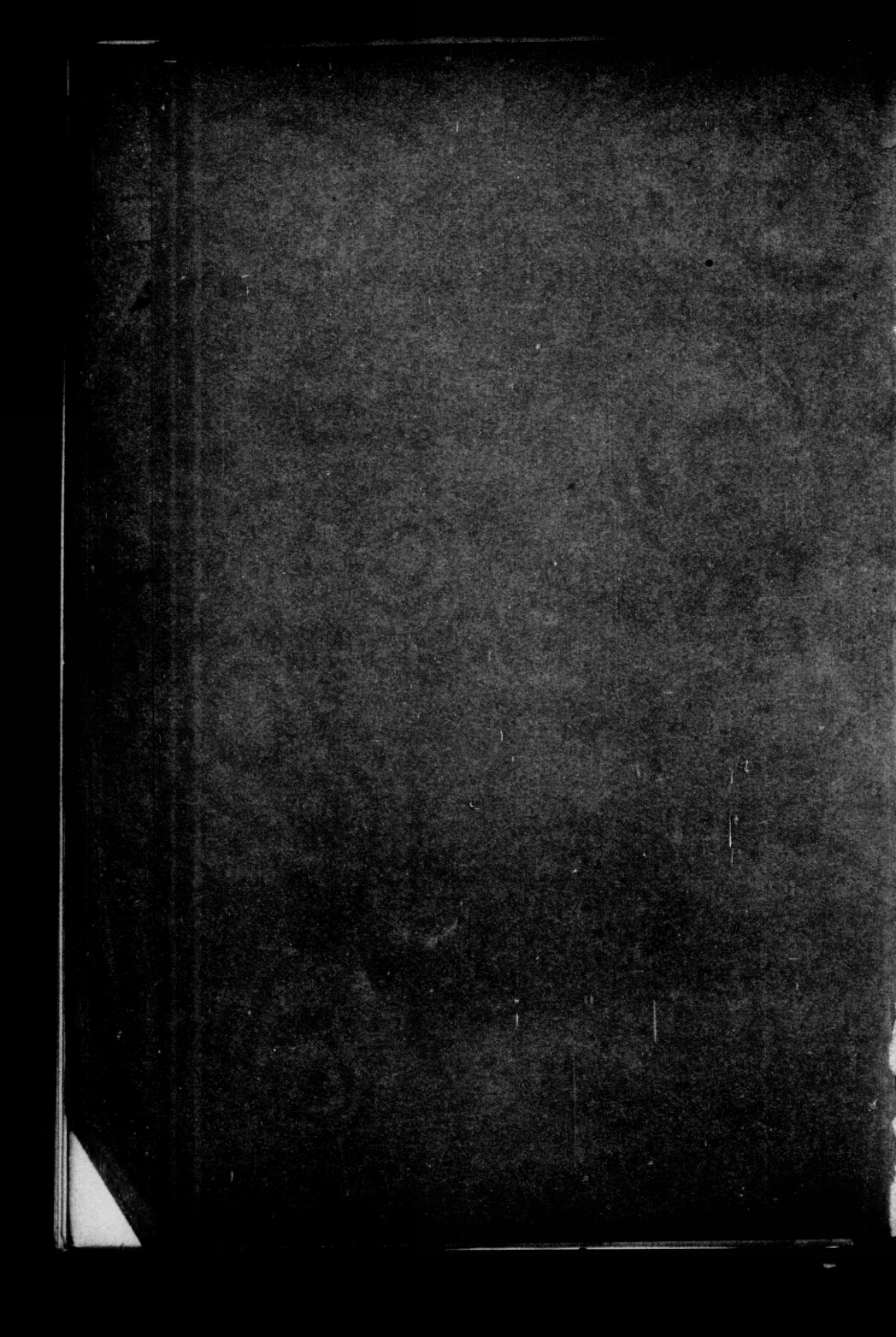
SUPREME COURT OF THE UNITED STATES.

No. 6 (ORIGINAL).

EX-PARTE: IN THE MATTER OF AUGUSTUS F. CLARKE, PETITIONER.

PETITION FOR WRIT OF HABEAS CORPUS.

FILED 18 October 1879.



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INDEX.

	Original.	Print.
Petition	1	1
Order allowing writ	5½	2
Indictment	7	3
Capias	11	5
Plea and recognizance	13	6
Recognizance forfeited and respited	15	6
Motion to quash indictment	17	7
Order overruling motion	18	7
Opinion on motion to quash	18	8
Demurrer	24	10
Demurrer overruled	25	10
Affidavit of Augustus F. Clarke	26	10
Jury sworn and trial	29	12
Verdict	31	12
Motion for new trial	32	13
Motion in arrest of judgment	33	13
Bill of exceptions	36	14
Sentence	38	15
Clerk's certificate	41	16
Writ of habeas corpus	42	16
Service	43	17
Marshal's return	46	18
Order of Judge Strong	50	19
Bond	51	20

1 To the Honorable the Judges of the Supreme Court of the United States.

Your petitioner, Augustus F. Clarke, respectfully represents, that he is a citizen of the United States of America and of the State of Ohio, and holds and exercises, and has for nearly six years last past held and exercised, the office of member of the city council of the city of Cincinnati, the same being a municipal corporation within the said State of Ohio; and that, as such member of the said city council, he is, and has been during the time aforesaid, charged by law with the duty of being one of the judges of election at all state, congressional, county, and municipal elections held within said city, viz't, for precinct "A," whereof he is a resident, of the eighth ward of said city, of which ward he is one of the representatives in said city council.

And your petitioner further represents unto your honors, that at the regular state, congressional, and county election held on the second Tuesday of October, 1878, within said city, he acted, as in pursuance of law it was his duty to act, as one of the judges of election for precinct "A" of said ward.

And your petitioner further represents, that afterwards, in the Circuit Court of the United States for the Sixth Circuit and
2 Southern District of Ohio, on the 24th day of October, 1878, by the grand jury duly empaneled and sworn under the laws of the United States, this your petitioner was indicted for unlawfully neglecting to perform the duty required of him as such judge of election by the laws of the said State of Ohio in regard to said election, in this: that having accepted one of the poll-books of said election, sealed and directed according to law, for the purpose of conveying the same to the clerk of the Court of Common Pleas of Hamilton County, in said state, at his office, he neglected to carry said poll-book thus sealed to said clerk at his office; and also, in another count of said indictment, that as such judge of election he did then and there violate a duty required of him by the laws of said state in regard to said election, in this, that having accepted the said poll-book, sealed and directed for the purpose aforesaid, he permitted the same to be broken open before he conveyed the same to said clerk; and afterwards, your petitioner having moved to quash said indictment and said motion having been overruled, and having demurred to said indictment for want of jurisdiction and said demurrer having been overruled, your petitioner pleaded not guilty to said indictment, and upon trial
3 before a petit jury, at the February term, 1879, of said court, your petitioner was found guilty upon both counts of said indictment; and afterwards, his motion for new trial in arrest of judgment having been overruled, your petitioner was sentenced by said court to be imprisoned in the jail of Hamilton County, Ohio, for the period of twelve months, and that he pay a fine of two hundred dollars and the costs of the prosecution to be taxed.

In pursuance of which sentence your petitioner has been arrested and imprisoned, and is now imprisoned and restrained from his liberty by Joseph C. Ulery, Marshal of the United States for the Southern District of Ohio.

And your petitioner represents that said court acted and were wholly without jurisdiction in the said premises, and that all the actions and doings of the said court, and the said imprisonment of your petitioner by the said marshal, were and are utterly void in law and of no legal effect, but that the same were and are unlawful; and by violence, subversive of the rights of your petitioner as a citizen of the United States and of the State of Ohio, and especially of his right to liberty; and your petitioner attaches hereto a full and complete transcript, duly certified, of all the record and proceedings in the said cause in the said Circuit Court for the United States for the Sixth Circuit and Southern District of Ohio, and prays that the same may be held and as fully taken to be a part of this petition as if they had at large been incorporated into and made part of the same.

And your petitioner prays that the writ of habeas corpus may be ordered by your honorable court to be issued, directed to the said Joseph C. Ulery, Marshal of the United States for the Southern District of Ohio, and your writ of certiorari to the clerk of said circuit court, in case your honors are pleased to order a further transcript of the record to be returned, that your petitioner may be admitted to bail, pending the hearing of the said writ of habeas corpus, and that upon the hearing thereof that your petitioner may be discharged from the said unlawful custody, and that justice may be done him in all other particulars according to law.

HOADLY, JOHNSON & COLSTON,
CHARLES W. BAKER,
Attorneys and of Counsel for Petitioner.

UNITED STATES OF AMERICA, } ss.
SOUTHERN DISTRICT OF OHIO. }

Augustus F. Clarke, being duly sworn, states that the matters and things set forth in the foregoing petition are true.

AUGUSTUS F. CLARKE.

Subscribed in my presence and sworn to before me, this 24th day of July, 1879.

A. W. GOLDSMITH,
[SEAL.] *Notary Public, Hamilton Co., Ohio.*

40c. paid to notary.

(Endorsed:) To the hon'ble the judges of the Supreme Court of the United States. In the matter of Augustus F. Clarke. Petition for writ of habeas corpus.

Writ of habeas corpus allowed, and directed to be issued by the clerk of the Supreme Court of the United States, returnable before me forthwith, at the Catskill Mountain House, Greene County, N.

Y. Writ to be directed to Joseph C. Ulery, esq., U. S. Marshal for the Southern District of Ohio. W. Strong, Asso. Justice S. C. U. S. July 31, 1879.

6 At a stated term of the District Court of the United States, within and for the Southern District of Ohio, begun and held at the court-rooms in the city of Cincinnati, on the first Tuesday of April, being the first day of that month, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States of America the one hundred and third.

Present, the Honorable Philip B. Swing, judge. Among the proceedings had were the following, to wit:

THE UNITED STATES }
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE. }

Be it remembered that heretofore, to wit, on the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, came the grand jurors of this district and presented a true bill of indictment against the said Augustus F. Clarke, clothed in the words and figures following, to wit:

7 THE UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF OHIO. } *ss.*

In the Circuit Court of the United States, within and for the Southern District of Ohio, in the sixth judicial circuit, of the term of October, in the year of our Lord one thousand eight hundred and seventy-eight.

First count. 5515. The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the said district, upon their oaths and affirmations, present that Augustus F. Clarke, on, to wit, the ninth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being then and there an officer of election at which a representative in Congress for the First Congressional District of Ohio was voted for, to wit: a judge of said election at precinct A of the Eighth ward of the city of Cincinnati, being a lawful polling place at said election, he, the said Augustus F. Clarke, having
8 been duly appointed such judge of election under the laws of the State of Ohio, did then and there unlawfully neglect to perform a duty required of him by the laws of said state in regard to said election, in that one of the poll-books of said election having been put under cover and sealed by the judges of election at said polling place, and directed to the clerk of the Court of Common Pleas of Hamilton County, as required by law, and he, the said

Augustus F. Clarke, one of said judges as aforesaid, having been selected by said judges to convey said poll-book to said clerk, and having accepted said poll-book sealed and directed as aforesaid for the purpose of conveying the same to said clerk, did neglect to convey said poll-book thus sealed to the said clerk at his office; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Augustus F. Clarke, on, to wit, the ninth day of October, in
9 the year of our Lord one thousand eight hundred and seventy-eight, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being then and there an officer of an election at which a representative in Congress for the First Congressional District of Ohio was voted for, to wit, a judge of such election at precinct A of the Eighth ward of the city of Cincinnati, being a lawful polling place at said election, he, the said Augustus F. Clarke, having been duly appointed such judge of election under the laws of the State of Ohio, did then and there violate a duty required of him by the laws of said state in regard to said election in that one of the poll-books of said election having been put under cover and sealed by the judges of election at said polling place and directed to the clerk of the Court of Common Pleas of Hamilton County, and he, the said Augustus F. Clarke, one of said judges as aforesaid, having been selected by said judges to convey said poll-book to said clerk, and having accepted said poll-book sealed and directed
10 as aforesaid, for the purpose of conveying the same to said clerk, did permit the same to be broken open before he conveyed the same to said clerk, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third count. And the grand jurors aforesaid, upon their oaths
5515. and affirmations aforesaid, do further present, that Augustus F. Clarke, on, to wit, the ninth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being then and there an officer of an election at which a representative in Congress for the First Congressional District of Ohio was voted for, to wit, a judge of such election at precinct A of the Eighth ward of the city of Cincinnati, being a lawful polling place at said election, he, the said Augustus F. Clarke, having been duly appointed such judge of election under the laws of the State of Ohio, did then and there do an act unauthorized by the
11 laws of the State of Ohio, in that, after one of the poll-books of said election had been put under cover and sealed up by the judges of election and directed to the clerk of the Court

of Common Pleas of Hamilton County, and he, the said Augustus F. Clarke, one of said judges as aforesaid, had received said poll-book, sealed and directed as aforesaid, for the purpose of conveying the same to said clerk, did permit the same to be opened and changed with intent to affect such election, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHANNING RICHARDS,
U. S. Attorney.

And, thereupon, there was issued out of the clerk's office of the court aforesaid our certain writ of capias ad respondendum, directed to the marshal of this district and against the said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss.
SOUTHERN DISTRICT OF OHIO. }

12 The President of the United States of America to the Marshal of the Southern District of Ohio, greeting:

We command you to take Augustus F. Clarke, if he may be found in your bailiwick, and him safely keep, so that you have his body before the judges of the Circuit Court of the United States, within and for the Southern District of Ohio, at the city of Cincinnati, in said district, forthwith to answer unto the United States of America on an indictment for neglect of duty as a judge of election presented to said court against him, the said Augustus F. Clarke, on the 24th day of October, A. D. 1878, by the grand jury of the United States within and for the said Southern District of Ohio.

Hereof fail not, under the penalty of the law, and have then and there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this 24th day of October, A. D. 1878, and in the 103rd year of the independence of the United States of America

[SEAL.] Attest: THOS. AMBROSE, *Clerk.*

13 And afterwards, to wit, on the twenty-sixth day of October, in the year last aforesaid, came the marshal to whom said writ was in form aforesaid directed and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Rec'd this writ at Cincinnati, O., Oct. 24th, 1878, and arrested the within-named Augustus F. Clarke, Oct. 26th, 1878, and have his body now in court, as within I am commanded.

W. R. THRALL, *U. S. M.*,
By E. C. TWIFORD, *Dept.*

And afterward, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Arraigned, plea not guilty, and recognizance in $2,000,
14 Julius Reis and Charles Jacobs, jr., sctys.—This day came the district attorney on behalf of the United States, and the said defendant having been arrested upon a capias ad respondendum, and brought into court in the custody of the marshal, and having been arraigned at the bar of this court and said indictment read to him, for plea says that he is not guilty in manner and form as therein charged, and for his trial puts himself upon the country, and the said district attorney doth the like. And on motion of the district attorney, it is ordered that the defendant enter into a recognizance, with good and sufficient security, in the sum of two thousand dollars, for his appearance before this court from day to day. And thereupon the said Augustus F. Clarke being present in court, and with him Julius Reis and Charles Jacobs, jr., his approved sureties, who severally acknowledge themselves to owe and stand justly indebted to the United States of America in the sum of two thousand dollars, to be made and levied of their several goods, chattels, land, and tenements to and for the use of the United States of America, in case the said Augustus F. Clarke shall fail to
15 make his personal appearance before this court from day to day as required, to answer unto an indictment pending therein against him, and not depart the court without the leave thereof.

And afterward, to wit, on the third day of February, in the year of our Lord one thousand eight hundred and seventy-nine, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Julius Reis and Charles Jacobs, jr., sctys.—This day came the district attorney on behalf of the United States, and the said defendant having been three times solemnly called to come into court pursuant to the tenor of his recognizance, came not, but made default; and the said sureties having been in like manner severally called to come into court, and with them being the body of their said principal, the said defendant, came not, but made default.
16 Whereupon it is ordered that the recognizance of said defendant and said sureties be now forfeited; and on motion of the district attorney it is ordered that the forfeiture be respited to the next term of this court, and said case is continued.

And afterward, to wit, on the fifteenth day of February, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day came the district attorney on behalf of the United States, and the said defendant being present in court pursuant to the tenor of a recognizance heretofore taken, by leave of court withdraws his former plea of not guilty heretofore entered, and files his motion to quash the indictment herein.

Which said motion is in the words and figures following,
17 to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Now comes the defendant and moves the court to quash the indictment, and each and every count thereof, for the following reasons:

1. No one of said counts states any crime against the United States, or punishable under its laws.
2. The third count fails to state that the acts therein complained of were done knowingly.
3. It is not within the power of the federal government to punish a state officer for neglect or refusal to perform a duty imposed by state law, or for the violation of such duty.

HOADLY, JOHNSON & COLSTON,
CHARLES W. BAKER,
Attorneys for Defendant.

18 And thereupon, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day this cause came on to be heard upon the defendant's motion to quash the indictment, and was argued by counsel and submitted. On consideration whereof the court overrule said motion. Whereupon the defendant re-enters his former plea of not guilty to said indictment.

And thereupon there was filed in the clerk's office of the court aforesaid the opinion of the Honorable John Baxter, circuit judge,

upon the motion to quash the indictment herein, clothed in the words and figures following, to wit:

19 THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

The defendant was a judge of the election held recently in Ohio, at which members of Congress were voted for, appointed by the state authorities, and stands indicted under section 5,515 of the Revised Statutes, for unlawfully neglecting to perform certain duties enjoined on him as such judge by the laws of Ohio. He appears and moves to quash the indictment, not because it is not within the purview of the act of Congress under which it is framed, but upon the ground that section 5,515, declaring such neglect of duty an offence against the United States and punishable by indictment in the federal courts, is unconstitutional and void. And in support of this position learned counsel here referred us to the case of The Commonwealth of Kentucky vs. Dennison, Governor, etc., 24 Howard, 66. We have been familiar with this case for a long time, and at the request of deft's counsel have re-examined it with considerable care. The facts are that the Governor of Ken-
20 tucky had, in pursuance of the act of Congress in that behalf enacted, made a demand on Governor Den*nison*, then Governor of Ohio, for the apprehension and surrender of an alleged fugitive from the former state. But Governor Dennison refused to comply with that requisition. Thereupon an application was made by the Commonwealth of Kentucky to the Supreme Court of the United States for a mandamus to compel Governor Dennison to perform the duty imposed upon him by the law The court refused the mandamus and said: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with such power. Indeed, such a power would place every state under the control and dominion of the general government, even the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel
21 him to perform it, for if it possessed this power it might overload the officer with duties which would fill up all his time and disable him from performing his obligations, and might impose on him duties of a character incompatible with the dignity to which he was elevated by the state."

We recognize in this decision an authority binding on us. And if that case and this are alike, deft's motion must prevail.

The duty of providing by law for the arrest and return of fugitives is imposed by the Constitution exclusively on Congress. And

in exercising the power thus conferred Congress saw fit to impose the duty of causing fugitives to be arrested and surrendered to the demanding state on the chief executive of the state in which the fugitive might be found. The duties thus enjoined on the governors of the states was generally exercised by them in all proper cases. But in the case of The Commonwealth of Ky. vs, Dennison, the latter declined to act, and the Supreme Court, as we have already seen, when applied to for a mandamus to compel him, held
22 that the federal government could not require him to perform such a duty. The language of the court was, of course, employed with reference to the facts of the case then before it.

But the duty of providing for the election of members of Congress is a matter in which both the federal and state governments have an interest. "The times, places, and manner of holding the elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

So it will be seen that the obligation to provide for the election of members of Congress is one that attaches to both the general and state governments, and, under the legislation upon the subject, the states hold the elections through officers of their own selection. But this duty is not left entirely to state supervision. It is performed under and in pursuance of the laws of both powers. The federal government does not assume "to overload a
23 state officer" with duties inconsistent with "his dignity" or with "his obligations to the state." Nor does it undertake to compel such officer to perform duties which under the Constitution are imposed exclusively on the federal government, as was true in the case of the Commonwealth of Ky. vs. Dennison, but commands a faithful compliance on the part of such officer in any matter pertaining to the holding of such elections and certifying returns, etc., that he is required by the state laws to do and perform. And any willful refusal or neglect to do any one or more of the things thus required is declared to be a crime against the United States and made punishable by indictment in the federal courts.

We think the law is within the constitutional power of Congress, and a very proper and delicate exercise of the national authority. The law being, as we think, valid, this court has jurisdiction of the offence charged in the indictment, and plaintiff's motion to quash will be disallowed.

BAXTER, *J.*

24 And afterward, to wit, on the twenty-eighth day of February, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day came the district attorney, on behalf of the United States, and the said defendant being present in court, pursuant to the tenor of a recognizance heretofore taken herein, by leave of court withdraws his former plea of not guilty heretofore entered to said indictment, and by like leave files his demurrer to said indictment; which said demurrer is in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

And now comes defendant and demurs to the indictment heretofore found herein, and to each count thereof, because, he
25 says, that the facts therein stated are insufficient in law to constitute an offence against the laws of the United States, and because this court has no jurisdiction of the offence therein charged, or charged in any of the courts thereof.

HOADLEY, JOHNSON & COLSTON,
Attys. for Defendant.

And thereupon a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

And now this cause coming on to be heard on demurrer of defendant heretofore filed herein, the court being fully advised in the premises, doth overrule the same, to all of which defendant excepts. Whereupon the defendant re-enters his former plea of not guilty to said indictment.

26 And afterward, to wit, on the fifth day of March, in the year last aforesaid, came the said defendant, by his said attorney, and filed in the clerk's office of the court aforesaid his certain affidavit, under crimes act herein, clothed in the words and figures following, to wit:

STATE OF OHIO, } *ss.*
HAM. CO. }

And now comes Augustus F. Clarke, who, being sworn, says that he is the defendant in the above cause; that he has no means and is unable to pay for the summoning of his witnesses or feeing them. He, therefore, asks that the following witnesses may be subpœnaed, and that they would certify as follows:

Hugh Quinn, who will testify as to the condition of the envelope containing the poll-book.

That Daniel Goring will testify to the same and the disposition of ballots.

Nicholas Elder and Robert Tracey as to the sealing of the poll-books.

Thomas Sanders will testify as to who took the poll-books,
27 as will also Michael Brenner.

James Jordan, who will testify that he saw the envelope broken.

Benj. Eggleston, Capt. James Wise, Charles Jacobs, as to character.

A. F. CLARKE.

Sworn to before me, this 5th day of March, A. D. 1879.

[SEAL.] C. W. BAKER,
Not. Pubc. Ham. Co., Ohio.

And afterward, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Upon application of the defendant, and it appearing to the court that he is in indigent circumstances and is unable to pay the expense of summoning the witnesses for his defence, and that
28 Hugh Quinn, Daniel Goring, Nicholas Elder, Robert Tracey, Thomas Sanders, Michael Brenner, James Jordan, Ben. Eggleston, James Wise, and Charles Jacobs will give evidence material to his defence, and that he cannot safely come to trial without them, it is ordered that said witnesses be summoned at the expense of the United States.

And afterward, to wit, on the sixth day of March, and in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Now comes the district attorney, on behalf of the United States, and makes known to the court that he is unwilling further to prosecute the third count of the indictment herein. It is by the court, therefore, considered that as to said third count the said defendant go hence without day.

29 And thereupon, but on the same day and in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Jury sworn, trial progressed.—This day came the district attorney on behalf of the United States, and the said defendant being present in court pursuant to the tenor of a recognizance heretofore taken herein, and having heretofore entered a plea of not guilty to said indictment, thereupon to try the issue came a jury, to wit, William B. Crouch, R. C. Edwards, Isaac Robinson, William Jackman, Samuel Walker, Samuel McWilliams, Israel B. Murdock, J. S. Northup, D. M. Peebles, James Robinson, H. H. Sears, and William Stoms, who were duly empaneled and sworn the truth to speak upon the issue joined between the parties, and the evidence being finished but counsel not having concluded their argument, the court adjourned the jury until to-morrow morning at nine o'clock, to which time this case is continued.

30 And afterward, to wit, on the seventh day of March, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day again came the parties by their attorneys, and also the jurors heretofore empaneled and sworn herein, and the evidence being finished but counsel not having concluded their argument, the court adjourned the jury until to-morrow morning at nine o'clock, to which time this case is continued.

And afterward, to wit, on the eighth day of March, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

31 THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day again came the parties by their attorneys, and also the jurors heretofore empaneled and sworn herein, who having heard the evidence, the argument of counsel, and the charge of the court, upon their oaths do say that the defendant is guilty in manner and form as charged in the first and second counts of said indictment.

Whereupon the said defendant by his attorneys gives notice of a motion for a new trial. And on motion of the district attorney it is ordered that the defendant enter into a recognizance with good and sufficient sureties in the sum of three thousand dollars for his appearance before this court from day to day. And thereupon the said Augustus F. Clarke, and with him Peter Lauer and Julius Reis, his approved sureties, being present in court, severally acknowledged themselves to owe and stand justly indebted to the United States of America in the sum of three thousand dollars, to be made and levied of their several goods, chattels, lands, and tene-
32 ments to and for the use of the United States of America in case the said Augustus F. Clarke shall fail to make his personal appearance before this court from day to day as required, to receive the sentence of the court, and not depart the court without the leave thereof.

And afterward, to wit, on the tenth day of March, in the year last aforesaid, came the said defendant by his said attorneys and filed in the clerk's office of the court aforesaid his certain motion for a new trial herein, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

And now comes the defendant and moves the court for a new trial in the above-entitled cause, for the following reasons:

1. Because the verdict is not sustained by sufficient evidence.
2. Because the verdict is contrary to law.
3. Error of law occurring at the trial.
33 4. Because of newly-discovered evidence.

GEO. HOADLY,
CHARLES W. BAKER,
Attys. for Defendant.

And afterward, but on the same day and in the year last aforesaid, came the said defendant, by his said attorneys, and filed in the clerk's office of the court aforesaid his certain motion in arrest of judgment, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

And now comes the defendant and moves the court in arrest of judgment, that it may be granted, and that he may be discharged from further answering in this cause, for the reasons—

1. That the grand jury which found the indictment had no legal authority to inquire into the offence charged, by reason of it not being within the jurisdiction of the court.

34 2. That the facts stated in either count of the indictment do not constitute an offence.

3. Because the two said counts in said indictment being for the same offence, a conviction as to both counts is contradictory and illegal, and therefore should operate as an acquittal.

4. Because said defendant cannot be guilty of both offences as charged, and therefore the conviction on each count is an acquittal on the other.

GEO. HOADLY,
C. W. BAKER,
Attys. for Defendant.

And afterward, to wit, on the thirty-first day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Peter Lauer and Julius Reis, sureties.—This day came the district attorney on behalf of the United States, and the
35 said defendant having been three times solemnly called to come into court, pursuant to the tenor of his recognizance, came not, but made default; and his said sureties having been in like manner severally called to come into court and bring with them the body of their said principal, the said defendant, came not, but made default; whereupon it is ordered that the recognizance of the said defendant and of his said sureties be now forfeited. And on motion of the district attorney it is ordered that the forfeiture be respited to the next term of this court, and said case is continued.

And thereupon, but on the same day and in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Now comes the defendant and presents his certain bill of
36 exceptions, which is by the court signed, sealed, allowed, and ordered to be made a part of the record in this cause.

Which bill of exceptions is in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

Be it remembered that upon the trial of this cause the counsel for the defendant asked the court to instruct the jury that, if the

defendant, being one of the judges of the election at precinct A of the 8th ward of the city of Cincinnati, as described in the indictment, at the election referred to in the first count of the indictment, did receive one of the poll-books, sealed and directed as in said count described, for conveyance to the clerk of the Court of Common Pleas of Hamilton County, in the State of Ohio, and did convey and deliver said poll-book, which had been thus sealed and directed to said clerk, within two days from the day of said election, then that it would be the duty of the jury to return a
37 verdict of acquittal upon said first count, although by the negligence of the defendant the seals of said poll-book were broken open while said poll-book was in the defendant's possession, after such receipt and before such delivery by him.

And the defendant's counsel further asked the court to instruct the jury that, although the defendant may have permitted said poll-book to be broken open while the same was in his possession as aforesaid, after its receipt by him for conveyance to said clerk, and before its conveyance and delivery to said clerk, yet if he delivered to said clerk, within two days from the day of said election, said poll-book which he had so received and which had been sealed and directed to said clerk, as described in the said count of said indictment, he is entitled to a verdict of not guilty upon said second count of said indictment.

But the court refused to give either of said charges, and refused to instruct the jury as requested in either of said charges. To which refusals, and each of them, counsel for the defendant then and there excepted.

38 Whereupon the defendant asked the court to sign, seal, allow, and order to be filed and made part of the record this bill of exceptions, which is done.

PHILIP B. SWING. [SEAL.]

And afterward, to wit, on the first day of July, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES
1252. *vs.* } Indictment.
AUGUSTUS F. CLARKE.

This day came the district attorney on behalf of the United States, and the said defendant being present in court, pursuant to the tenor of his recognizance heretofore taken herein; thereupon this cause came on to be heard upon the motions for a new trial and in arrest of judgment, and were argued by counsel and submitted. On consideration whereof, the court overrule said motions, to which the defendant excepts. Whereupon the court pro-
39 nounced the following sentence, to wit:

That the said Augustus F. Clarke be imprisoned in the jail of Hamilton County, Ohio, for the period of twelve months,

and that he pay a fine of two hundred dollars and the costs of this prosecution to be taxed. And it is ordered that the imprisonment portion of this sentence be, and the same is hereby, suspended for twenty days. And on motion of the district attorney, it is ordered that the defendant enter into a recognizance, with good and sufficient security, in the sum of three thousand dollars, for his appearance before this court from day to day. And thereupon the said defendant, being present in court, and with him Julius Reis, his approved surety, severally acknowledged themselves to owe and stand justly indebted to the United States of America in the sum of three thousand dollars, to be made and levied of their several goods, chattels, lands, and tenements, to and for the use of the United States of America, in case the said Augustus F. Clarke shall fail to make his personal appearance before this court from day to day, as required, to enter upon the sentence of the
40 court and not depart the court without the leave thereof.

41 UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF OHIO. }

I, Thomas Ambrose, clerk of the Circuit Court of the United States for the Southern District of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the United States is plaintiff and Augustus F. Clarke is defendant, as the same remain in this office.

In testimony whereof, I hereunto set my hand and affix the seal of the said Circuit Court of the United States, this 8th day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States of America the 104th.

[SEAL.] Attest: THOS. AMBROSE,
Clerk U. S. C. C. S. D. O.

(Endorsed:) Supreme Court U. S. Received 14th August, 1879. D. W. M., clerk. Hoadly, Johnson & Colston, & C. W. Baker, attys.

42 THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to Joseph C.
[SEAL.] Ulery, United States Marshal for the Southern District of Ohio, greeting:

You are hereby commanded to produce the body of Augustus F. Clarke, detained in your custody and charge as is said, forthwith at the Catskill Mountain House, in the county of Greene, State of New York, together with the day and cause of his detention, to do, submit to, and receive whatsoever the Honorable William Strong, Associate Justice of the Supreme Court of the United States, now awarding this writ, and before whom the same is returnable, shall consider in this behalf.

Witness the Honorable William Strong, associate justice as afore-

said, this fourth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

D. W. MIDDLETON.
Clerk Supreme Court U. S.

43 MARSHAL'S OFFICE, SUP. COURT U. S.,
WASHINGTON, *Aug.* 4, 1879.

I do hereby authorize and depute Edward Colston to execute and serve the foregoing writ of habeas corpus.

JOHN G. NICOLAY,
Marshal Sup. Court U. S.

Received the foregoing writ Thursday, August seventh, A. D. 1879, and on the same day, at the city of Cincinnati, within the Southern District of Ohio, I duly executed and served same in pursuance of the foregoing authority from John G. Nicolay, Esq., Marshal of Supreme Court of United States, upon the said Joseph C. Ulery, marshal, &c., at his office in the said city of Cincinnati, at 10 o'clock and thirty minutes A. M., by producing to him said writ and reading same to him, and by handing a true copy thereof to him personally.

EDWARD COLSTON.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF OHIO. } *ss.*

Edward Colston being by me first duly sworn, maketh oath to the truth of the above return.

Witness my hand and seal.

[SEAL.] SAM'L S. CARPENTER,
Commissioner of the U. S. Circuit Court in and for the Southern District of Ohio.

44 THE UNITED STATES OF AMERICA, *ss.*

[SEAL.] The President of the United States of America to Joseph C. Ulery, United States Marshal for the Southern District of Ohio, greeting:

You are hereby commanded to produce the body of Augustus F. Clarke, detained in your custody, and charged as is said, forthwith at the Catskill Mountain House, in the county of Greene, State of New York, together with the day and cause of his detention, to do, submit to, and receive whatsoever the Honorable William Strong, Associate Justice of the Supreme Court of the United States, now awarding this writ, and before whom the same is returnable, shall consider in this behalf.

Witness the Honorable William Strong, associate justice as aforesaid, this fourth day of August in the year of our Lord one thousand eight hundred and seventy-nine.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

45 MARSHAL'S OFFICE, SUP. COURT U. S.,
WASHINGTON, *Aug.* 4, 1879.

I do hereby authorize and depute Edward Colston to execute and serve the foregoing writ of habeas corpus.

JOHN G. NICOLAY,
Marshal Sup. Court U. S.

(Endorsed:) Supreme Court U. S. Ex-parte Augustus F. Clarke. Order to produce the body of Augustus F. Clarke. Copy.

46 IN RE AUGUSTUS F. CLARKE. } Habeas Corpus.

Joseph C. Ullery, United States Marshal for the Southern District of Ohio, makes return to the writ of habeas corpus served upon him by the marshal of the Supreme Court of the United States, and says, that on the 24th day of July, A. D. 1879, he received from the Circuit Court of the United States for the Southern District of Ohio an order of commitment commanding him, as marshal of said district, to take the body of Augustus F. Clarke and commit the same to the jail of Hamilton County, pursuant to the sentence of said court in a certain case therein pending (a true copy whereof is hereto attached); that, in accordance with said order, he did take the body of said Augustus F. Clarke and commit the same to said jail on the same day, taking receipt of the jailor therefor (a true copy whereof is also attached hereto), and made return thereof to said court (a true copy of which said return is also attached hereto); and the said Augustus F. Clarke has been confined in the jail of Hamilton County, Ohio, by virtue of said commitment.

The body of said Augustus F. Clarke is produced as directed by the writ of habeas corpus.

J. C. ULLERY,
U. S. Marshal S. D. O.

47 UNITED STATES OF AMERICA, } *ss.*
SOUTHERN DISTRICT OF OHIO. }

Joseph C. Ullery, being duly sworn, says that the facts stated in the above return are true.

J. C. ULLERY.

Subscribed and sworn to before me, this 9th day of August, A. D. 1879.

[SEAL.]

THOS. AMBROSE,
Clerk U. S. Cir. Ct. S. D. O.

48 *Copy.*

U. S. Circuit Court S. D. O.

THE UNITED STATES
1252. *vs.*
AUGUSTUS F. CLARKE. } Indictment for neglect of duty as judge of election.

The defendant, Augustus F. Clarke, having been tried by a jury

and found guilty as charged in the first and second counts of said indictment—

Thereupon the court pronounced the following sentence, to wit: That the said Augustus F. Clarke be imprisoned in the jail of Hamilton County, Ohio, for the period of twelve months, and that he pay a fine of two hundred dollars and the costs of this prosecution to be taxed.

You are therefore commanded, as marshal of this district, to take the body of the said Augustus F. Clarke and commit the same to said jail, pursuant to said sentence.

Witness my hand and the seal of said court, at Cincinnati, this 24th day of July, A. D. 1879.

[SEAL.] Attest: THOS. AMBROSE, *Clerk.*

49 (Endorsed:) 1252. Criminal. U. S. Circuit Court S. D. O. The United States vs. Augustus F. Clarke. Final commitment. Filed July 24th, 1879. Tho. Ambrose, clerk. A true copy. J. C. Ullery, U. S. marshal, by J. A. Ullery, dept.

Received, Cincinnati, Ohio, July 24th, 1879, the body of the within-named Augustus F. Clarke. G. J. Birnbaum, H. T., jailor Hamilton-County jail.

Received this writ at Cincinnati, O., July 24th, 1879, and on the same day delivered the body of the within-named Augustus F. Clarke into the custody of the jailor of Hamilton-County jail, together with a true copy of this writ, as within I am commanded. J. C. Ullery, U. S. M., by C. E. Turford, dept.

Fees:	Service,	2 00.
	Copy,	50.
	Com.,	50.
	1 M. writ,	06.
	1 " pris.,	10.
	1 " dept.,	10.
	1 " gd.,	10.
		$3 36.

Supreme Court U. S. Ex-parte Augustus F. Clarke. Return of J. C. Ullery, U. S. Marshal S. D. O., to writ of habeas corpus.

50 In the Supreme Court of the United States.

EX-PARTE AUGUSTUS F. CLARKE. } August 11th, 1879.

Now comes Joseph C. Ullery, Marshal of the United States for the Southern District of Ohio, and in obedience to the writ of habeas corpus directed to him from the clerk's office of the Supreme Court of the United States, produces here the body of the petitioner, Augustus F. Clarke, to await the order of the court in

the premises, and files his return under oath accordingly; whereupon it is ordered by the court that the hearing of the cause be postponed into the Supreme Court of the United States, there to be heard upon the second Tuesday of October, 1879. And it is ordered that the petitioner be admitted to bail in the sum of five thousand dollars, with two sureties, freeholders of the district, approved by the clerk of the Circuit Court of the United States for the Southern District of Ohio, to abide the rule of the Supreme Court in the premises.

W. STRONG, *J.*

(Endorsed:) Supreme Court of the United States. Ex-parte Augustus F. Clarke. Order. Received 14 August, 1879. D. W. M., clerk.

51 Supreme Court of the United States.

THE UNITED STATES
ads.
AUGUSTUS F. CLARKE.

Know all men by these presents, that we, Augustus F. Clarke, of the city of Cincinnati, county of Hamilton, State of Ohio, principal, and Barnard Schwegmann, of the city of Cincinnati, county of Hamilton, and State of Ohio, and Daniel Wolf, of the city of Cincinnati, county of Hamilton, and State of Ohio, sureties, are held and firmly bound unto the United States of America in the sum of "five thousand dollars ($5,000) lawful money of the United States, to be paid to the said the United States of America.

To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly *be the* presents.

Sealed with our seals, and dated this twenty-second day of August, A. D. 1879.

Whereas the above-named Augustus F. Clarke hath sued
52 out of said Supreme Court a writ of hebeas corpus, directed to the marshal of the Southern District of Ohio, commanding him to appear before the Honorable W. Strong, one of the justices of said Supreme Court, and whereas, upon the hearing of the same before the said Justice Strong, an order was made postponing the hearing of said matter until the second Tuesday of October, A. D. 1879, and admitting the said Augustus F. Clarke to bail in the sum of "five thousand dollars ($5,000)," with two sureties, freeholders of the Southern District of Ohio, approved by the clerk of the Circuit Court of the United States for said Southern District of Ohio, to abide the order of the said Supreme Court of the United States of America in the premises, as by a certified copy of said order of the said Justice Strong, deposited in the

clerk's office of the circuit court aforesaid, fully and at large appears.

Now, therefore, the condition of this obligation is such, that if the above-named Augustus F. Clarke shall abide the decree of the said the Supreme Court of the United States of America in
53 the premises, then this obligation to be void, otherwise to remain in full force, virtue, and effect in law.

AUGUSTUS F. CLARKE. [SEAL.]
BARNARD SCHWEGMANN. [SEAL.]
DANIEL WOLF. [SEAL.]

Signed in the presence of—
RICHARD DORMAN.
J. M. MATTHEWS.

Taken and acknowledged before me the day and year first above written.

[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court
Southern District Ohio.

SOUTHERN DISTRICT OF OHIO, *ss.*

I, Barnard Schwegmann, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name, situate in the county of Hamilton in said district.

BARNARD SCHWEGMANN.

54 Sworn to before me, this 22d day of August, 1879.

[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court
Southern District Ohio.

SOUTHERN DISTRICT OF OHIO, *ss.*

I, Daniel Wolf, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name, situate in the county of Hamilton in said district.

DANIEL WOLF.

Sworn to before me, the 22d day of August, 1879.

[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court
Southern District Ohio.

55 I, Thomas Ambrose, clerk of the Circuit Court of the United States for the Southern District of Ohio, hereby certify that Barnard Schwegmann and Daniel Wolf, the sureties in the above bond mentioned, are residents, citizens, and freeholders

of the said county of Hamilton, State of Ohio; that I am personally acquainted with them, and that they are respectively financially responsible for more than the penalty of the bond.

[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court
Southern District Ohio.

I, Channing Richards, attorney for the United States of the Southern District of Ohio, hereby certify that I am personally acquainted with Barnard Schwegmann and Daniel Wolf, sureties in the above bond mentioned, who are residents, citizens, and freeholders of said county of Hamilton, State of Ohio, and that they are respectively financially responsible for more than the penalty of the bond.

CHANNING RICHARDS,
U. S. Atty.

Robert Clarke & Co., Printers, Cincinnati, O. [*October*, 1879.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1879.

In the matter of Augustus F. Clarke.

UPON HABEAS CORPUS.

ARGUMENT IN BEHALF OF PETITIONER,

By HOADLY, JOHNSON & COLSTON,
His Counsel.

Robert Clarke & Co., Printers, Cincinnati, O. [*October*, 1879.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1879.

In the matter of Augustus F. Clarke.

UPON HABEAS CORPUS.

ARGUMENT IN BEHALF OF PETITIONER,

By HOADLY, JOHNSON & COLSTON,
His Counsel.

CASE STATED.

This is a petition, for discharge upon the writ of *habeas corpus*, by Augustus F. Clarke, who is suffering imprisonment in the jail of Hamilton county, Ohio, in pursuance of the sentence of the Circuit Court for the Southern District of Ohio (Record, 15).

At the congressional election held in Ohio on the 9th day of October, 1878, Clarke was duly appointed, under the laws of the State of Ohio, and acted as a judge of election at Precinct A of the Eighth ward of the city of Cincinnati. For misconduct in such official capacity,

he was indicted, convicted, and sentenced to imprisonment for twelve months and to pay a fine of two hundred dollars, under the following section of the Revised Statutes of the United States:

"Section 5515. Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law, respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate, as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime; or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and (ten) (eleven)."

The indictment contained three counts, which charged (Record, 3), respectively, *first*, that Clarke

"did then and there unlawfully neglect to perform a duty required of him by the laws of the said State, in regard to said election, in that one of the poll-books of said election, having been put under cover and sealed by the judges of election, at said polling place, and directed to the Court of Common Pleas, as required by law, and he, the said Augustus F. Clarke, one of said judges as aforesaid, having been selected by said judges to convey said poll-book

to said clerk, and having accepted said poll-book, sealed and directed as aforesaid, for the purpose of conveying the same to said clerk, did neglect to carry said poll-book, thus sealed, to said clerk, at his office."

Secondly, that he

"did then and there violate a duty required of him by the laws of said State, in regard to said election, in that one of the poll-books of said election, having been put under cover and sealed by the judges of election, at said polling place, and directed to the clerk of the Court of Common Pleas of Hamilton county, and he, the said Augustus F. Clarke, one of said judges, as aforesaid, having been selected by said judges to carry said poll-book to said clerk, and having accepted said poll-book, sealed and directed as aforesaid, for the purpose of conveying the same to said clerk, did permit the same to be broken open, before he conveyed the same to said clerk."

The *third* count charged Clarke with doing "an act unauthorized by the laws of the State of Ohio," in that having received the poll-book as aforesaid, he permitted the same to be "opened and changed with intent to affect such election."

The defendant moved to quash the indictment, and, after this had been overruled, demurred (Record, 7, 10); but this was also overruled. The third count was abandoned by the district attorney (Record, 11), (it omitted to charge that the offence was committed "knowingly"), and, upon trial, the defendant was found "guilty in manner and form as charged in the first and second counts of the indictment" (Record, 12). He then moved for new trial and in arrest of judgment, which having been overruled, he was sentenced, and his sentence carried into effect, as already stated.

During the trial, a bill of exceptions was taken (Record, 14), which shows that the judge (Judge Swing) refused to charge the jury that the defendant could not be convicted, if he actually conveyed the poll-book to the clerk of the Court of Common Pleas within two days from the day of election, upon the *first* count, although by his negligence the seals of the poll-book might have been broken open; nor upon the *second* count, although he might have permitted the poll-book to have been broken open while in his possession.

The election at which the petitioner officiated as judge was, under the constitution and laws of Ohio, the annual general election of State and county officers, as well as the biennial election of representatives in Congress. The statute of Ohio which required the performance of duty Clarke is supposed to have neglected and violated, is the *nineteenth* section of the general election law (1 Swan & Critchfield's Statutes, 535). In order that the Court may have before its eye at once such of the provisions of the laws of Ohio as bear upon the petitioner's duty in the premises, we copy sections 11 to 19, inclusive. The parenthetical numbers are those of the chapter as arranged by the editors of the statutes. We italicise the language which is claimed to have imposed upon Clarke the duty of preventing the seal from being broken while the poll-book was in course of conveyance to the clerk:

"(24.) Section XI. That at the close of the polls the poll-books shall be signed by the judges and attested by the clerk; and the names therein contained shall be counted, and the number set down

at the foot of the poll-books, in the manner hereinafter provided in the form of the poll-books.

"(25.) Sec. XII. That after the poll-books are signed in the manner hereinafter contained, in the form of the poll-books, the ballot-boxes shall be opened, and the ballots or tickets therein contained shall be taken out one at a time, by one of the judges, who shall read distinctly, while the ticket remains in his hand, the name or names therein contained, and then deliver it to the second judge, who shall examine the same and pass it to the third judge, who shall string it on a thread and carefully preserve the same; the same method shall be observed in respect to each of the tickets taken out of the ballot-box, until the number taken out of the ballot-box is equal to the number of names in the poll-books.

"(26.) Sec. XIII. That the clerks shall enter in separate columns, under the names of the persons voted for, as hereinafter provided in the form of the poll-books, all the votes so as aforesaid read by the judges.

"(27.) Sec. XIV. That whenever two or more ballots are found folded or rolled together, it shall be conclusive evidence of their being fraudulent.

"(28.) Sec. XV. That if a ballot should be found to contain a greater number of names for any one office than the number of persons required to fill that office, it shall be considered fraudulent as to the whole of the names designated to fill such office, but no further.

"(29.) Sec. XVI. That a ballot shall not be considered fraudulent for containing a less number of names than are authorized to be inserted.

"(30.) Sec. XVII. That, after the examination of the ballots shall be completed, the number of votes for each person shall be enumerated, under the inspection of the judges, and set down as hereinafter provided in the form of the poll-books, and be publicly proclaimed to the people present.

"(31.) Sec. XVIII. That the following shall be the form of the poll-books to be kept by the judges and clerks of election under this act:

* * * * * * * * *

"(32.) Sec. XIX. That, after canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; *and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they can not agree otherwise) to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election;* and the other poll-book, where the same is not otherwise disposed of by this act, shall be deposited with the township clerk, or clerk of the election district (as the case may be), within three days from the day of the election, there to remain for the use of the persons who may choose to inspect the same."

Our contention is, that the Circuit Court acted without jurisdiction, in the indictment, trial, and sentence of the prisoner; and that the duties he is supposed to have neglected and violated were imposed by no law of the United States, nor of Ohio.

ARGUMENT.

I.

By article 3, section 2 of the constitution, it is provided that

"the judicial power shall extend to all cases in law and equity, *arising* under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," etc.

The Circuit Courts have jurisdiction (Rev. Stat., sec. 629, paragraph 20)—

"of all crimes and offences cognizable under the authority of the United States."

In this case the Circuit Court was without jurisdiction, for the reason that while a violation or disregard of duty imposed by a State may be an offence "cognizable under the authority" of the State, it can never be a crime "cognizable under the authority of the United States," inasmuch as that which the laws of the State properly require can only give birth to "cases arising under the constitution" of the State and its laws, and not to cases

"arising under this constitution, the laws of the United States, and treaties made," etc.

Nor can a duty which derives its legal origin from, and the breach of which presents a case arising under the constitution of the United States, and the laws passed by Congress in pursuance thereof, be said to have been required or imposed by the laws of any State.

"Cases arising under this constitution, the laws of the United States, and treaties made," etc.,

when they amount to

"crimes and offences cognizable under the authority of the United States,"

are obviously crimes and offenses "against the United States," and not breaches of duty imposed by the States.

Section 1014 of the Revised Statutes confirms this construction. It provides that

"for any crime or offence against the United States, the offender may * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as, by law, has cognizance of the offence."

We find no mention, in any section of the Revised Statutes, or in any law since passed by Congress, of any power to arrest, imprison, or hold to bail, for any crime or offence against Ohio, or any other State. Yet what were the supposed crimes committed by Clarke, and for which he suffered imprisonment until held to bail under this writ of *habeas corpus*, but crimes, if at all, against Ohio? They were, as is explicitly stated in the *first* count of the indictment, the

"neglect to perform a duty required of him by the laws of the said State;"

and, in the second count, the violation of

"a duty required of him by the laws of said State."

Nor had Congress power to confer jurisdiction in such cases upon the Circuit Courts. This follows from

the limitation of the judicial power, already quoted from the constitution. It is also manifest from other considerations.

II.

The provision of the constitution relied on to support section 5515 of the Revised Statutes is article 1, section 4:

"The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time make or alter such regulations, except as to the places of choosing senators."

The case at bar does not relate to the time or place, nor does the act of Congress in the particulars in question regulate the manner of holding any election. It is neither an alteration of the regulations prescribed by Ohio, nor a new regulation made by Congress relative to the "*manner* of holding elections for representatives" in Congress. It must be sustained, if at all, as the exercise of power, under section 8 of the same article, paragraph 18:

"To make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

This section has been held to confer the power to create, define, and punish, as crimes against the United States, acts proper to be prevented in effectuating the objects of the government.

United States v. *Worrall*, 2 Dall. 384.
McCulloch v. *Maryland*, 4 Wheat. 479.
United States v. *Marigold*, 9 How. 560.

As we have already said, the act in question is no alteration of a regulation prescribed by the legislature of the State of Ohio, relative to the "*manner* of holding elections." It is the addition of a Federal penalty for breach of a State statute. The regulations prescribed by the legislature of Ohio remain unaltered, notwithstanding section 5515 of the Revised Statutes. But, for their disregard or violation, the Federal government has imposed a further punishment. Were it necessary, we should, with confidence, contend that while it is perfectly clear that Congress may, at any time, alter a regulation prescribed by the legislature of a State relative to "the manner of holding elections for senators and representatives," yet that the regulation thus altered remains a State law, and does not become a Federal regulation, and therefore must be enforced by State, not Federal agencies. This question, however, does not arise, "the manner of holding elections for senators and representatives" "prescribed" in Ohio "by the legislature thereof," not having been altered in any respect now necessary to be considered by Federal legislation. Nor has any new regulation been "made" by Congress relative to "the *manner* of holding elections" in Ohio. The State having prescribed its own regulations in this particular, Congress has seen fit to add a penalty for their neglect or violation. And this is unconstitutional, for the obvious reason that the power to pass laws necessary and proper for carrying into execution

the granted powers, is, by its terms, limited to the powers vested by the Constitution in the Federal government. Until Congress shall make regulations relative to "the manner of holding elections for senators and representatives," the power to add sanctions to enforce obedience, by creating, defining, and punishing, as crimes, acts in disregard or violation of such regulations, can not be exercised, and when exercised, can not extend beyond the scope of such regulations. As far as the regulations relative to "the manner of holding elections" are left to be prescribed in each State by the legislature thereof, the law providing punishment for their disregard or violation can not be said to be necessary or proper to carry into execution a power

"vested by this constitution in the government of the United States, or in any department or officer thereof."

And even if we are wrong in assuming that the exercise of the power to alter State regulations as to "the manner of holding elections," leaves the altered rule to be enforced as a State, and not as a Federal regulation, and Congress has power to compel obedience by appropriate punishments, still the power, "vested in the government of the United States," thus exercised, is the power to "alter," and the extent of the power to punish must be measured by the necessity and propriety of enforcing the alteration, not of compelling obedience to the original State regulation, as far as it remains unchanged.

And punishment for the disregard or violation of a law of Ohio can not, in the nature of things, be the means of enforcing obedience of any Federal statute.

The only possible answer to this consists in treating section 5515 as being effective, at one and the same time, for the adoption, as Federal regulations, of all the laws of all the States relative to the manner of holding elections for senators and representatives in Congress, and for the punishment of offences against the same laws considered as such Federal regulations.

But, *first*, upon its face, as we shall hereafter more fully show, the act only adds a Federal penalty to the violation of a duty imposed by State laws. It violently distorts its plain meaning to give it the effect claimed.

"This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *United States* v. *Wiltberger*, 5 Wheat. 85." *United States* v. *Reese*, 92 U. S. 219.

And, *secondly*, if it have the effect to re-enact the State laws in the form of Federal regulations, then these laws cease to exist as State regulations, and the duty of obedience has, since 1870, when section 5515 first found its way into the statutes, been a duty no longer required or imposed by State law. Although the petitioner, Clarke, may have neglected or refused to perform a duty imposed by law, this was not, on this theory, a duty required of him by any law of Ohio, but by the laws of the United States. For this, however, he was not indicted.

That the control of the time, place, and manner of holding congressional elections, when and as far as exercised by Congress, is exclusive, we certainly need not argue. The power was given for the express purpose of

enabling the Federal government to supersede State action, or supply action for inaction, so as to insure the continuance of national life, in the event of the refusal or neglect of the States to legislate effectively to that end. It is a power, the exercise of which by the States depends upon Federal non-intervention. But the moment Congress speaks in the form of law, the regulations prescribed in the States by the legislatures thereof must give way to the alterations or regulations made by Federal power. They can not co-exist. Duty may be due to one or the other authority, but can not be owing to both.

Clarke was indicted for "neglect to perform," and for violation of "a *duty* required of him by the laws of said State" of Ohio, not by the laws of the United States. But, on the theory we are combatting, this had ceased to be a duty imposed by the laws of Ohio as early as 1870.

Suppose it be otherwise. We then recur to our first proposition. The act does not provide that any *act* or *fact* done or omitted, contrary to the terms of a State statute relative to elections, shall, by reference, be incorporated into Federal jurisprudence, and thereafter treated and held to be the violation of Federal law. On the contrary, its provision is that punishment shall be inflicted for neglect or violation of *duty* required or imposed by State law. It might, perhaps, be competent for Congress to legislate, by way of schedule, exhibit, or reference, that *acts* which had been already defined as crimes by State laws, should thereafter be cognizable as offences against Federal power, but the "*duty*" of obedience thus established would be a duty required and imposed by Con-

gress, not by the State, whereas the law in question here does not purport to create a Federal duty, but to punish neglects and violations of duty required by State laws. This is perfectly clear from the language of the section :

"Who neglects or refuses to perform any duty in regard to such election, required of him by any law of the United States, *or* of any State or Territory thereof; or who violates any duty so imposed."

And Clarke's supposed crime, according to the indictment, was, not that he neglected or violated a duty required of him, by "any law of the United States," but, as it expressly, and in terms, alleges, "a duty required of him by the laws of the said State." The *third* count of the indictment, for doing an *act* unauthorized by any law of the United States, or any State or Territory, it must be recollected, was abandoned.

How can it be made to appear that performance of a "duty" required of Clarke by "any law of any State," is secured by the constitution or laws of the United States? Yet it has been recently held by this Court, that only when a right is thus granted or secured, may its violation or disregard be punished as a crime, nor then unless declared by Congress to be a crime against the United States.

In *United States* v. *Cruikshank*, 92 U. S. 549, the Chief Justice says :

"To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress."

And, again, in *United States* v. *Reese*, 92 U. S. 217, the Chief Justice says :

"Rights and immunities created by or dependent upon, the Constitution of the United States can be protected by Congress."

And again, upon page 216 :

"If Congress has not declared an act done within a State to be a crime against the United States, the Courts have no power to treat it as such. *United States* v. *Hudson*, 7 Cranch, 32."

These passages indicate the conditions precedent to a lawful conviction for crime. *First*. The right must be secured by the constitution, and the corresponding duty therefore must, by the terms of the constitution, or by laws passed in pursuance to its provisions, have become a Federal duty. *Secondly*. Congress must have declared it to be a crime against the United States.

Neither is true here. The right is left by the constitution, in express terms, to the security of State legislation, until Congress shall intervene and supersede the regulations prescribed by the State, and Congress has not prescribed the manner of holding congressional elections, at least, in any particular involved in this case. The duty under consideration is imposed only by State laws, and while Congress has provided for punishment, this is for the violation or disregard of the duty, not as an crime against the United States, but as an offence against the State only. This is put beyond controversy by the terms of the act,

"any duty required of him by any law of the United States *or* of any State."

III.

But our contention does not stop here. When Congress shall exercise its undoubted power "to make such regulations"—an exercise that may become absolutely essential to our continued existence as a Nation—it must do so through the Federal agencies, which have been amply conferred for that purpose.

These are made sufficient, *first*, in regard to legislative efficiency, by the grant of power to "make all laws which shall be necessary and proper for carrying into execution" the powers enumerated in article 1, section 8, and all others vested by the constitution in the government of the United States, its departments and officers; *secondly*, in respect of pecuniary ability, by the grant of power to borrow and to coin money; *thirdly*, in regard to provision for agents and officers, by the grant made in article 2, section 2, paragraph 2, to the President of the United States of power to appoint

> "all other officers of the United States, . . . which shall be established by law,"

with the reservation to Congress of the right by law

> "to vest the appointment of such inferior officers as they think proper, in the president alone, in the Courts of law, or in the heads of departments,"

the value and force of which is not diminished by the fact that this Court, in *Ex parte Duncan N. Hennen*, 13 Peters, 257, expounded the meaning of this reservation or pro-

viso, in connection with the division of governmental authority into the three great departments, executive, legislative, and judicial, to be that

"the appointing power here designated, in the latter part of the section, was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged"—

a decision which the framers of the election laws of 1870 had no doubt forgotten, when they required the judicial department to take charge of congressional elections.

And, *fourthly*, the Federal authority is made further effective in respect of the execution of the electoral power by the grant of authority

"to provide for calling forth the militia to execute the laws of the Union."

In the words of Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 483:

"No trace is to be found in the constitution of an intention to create a dependence of the Federal government on the governments of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it can not control, which another government may furnish or withhold, would render its cause precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

This is proved, in respect to the power now under debate, by the declared purposes of the framers of the con-

stitution, and by the recorded history of subsequent judicial construction.

That the object of the convention in adopting, and of the States in ratifying, this provision of the constitution, was to create an authority whereby the Federal government might, by means of its own agencies, without the use of those of the States, and even in despite of conflicting State legislation, preserve itself from dissolution, clearly appears in the history of those times.

General Hamilton's advocacy of this provision is summed up in the following sentence, which we copy from No. 59 of the *Federalist* (J. C. Hamilton's edition, 448):

> "I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government should contain in itself the means of its own preservation.*"

"In itself." These words indicate the extent of the error into which the authors of the election laws of 1870 fell. Instead of using the appropriate agencies, lying, as it were, in their hands, a confusion of ideas, and the want of clear perceptions of distinctions not at all obscure in the constitution or its history, lead them to grasp more than they could handle, by undertaking to use both State and Federal agencies, as well as to blend the offices of the judicial and executive departments, for the purpose of enlarging Federal authority, and this long after the war against it had ceased.

Mr. Madison annotated the adoption, by the con-

vention, of the provision now under consideration, August 9, 1787 (5 Elliott's Debates, 402), thus:

"This was meant to give the national legislature a power not only to alter the provisions of the States, but make regulations, in case the States should fail or refuse altogether."

And, in the Virginia Convention, he expressed himself more fully, but to the same effect (3 Elliott, 366, 367):

"But it was necessary to give the general government a control over the time and manner of choosing the senators, to prevent its own dissolution. * * * * * * *

"It was found necessary to leave the regulation of these, in the first place, to the State government, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And, considering the State government and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the State governments, the general government might easily be dissolved; but if they be regulated properly by the State legislatures, the Congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the constitution."

And, in the same convention, Mr. Nicholas said (3 Elliott, 9):

"I flatter myself that, from a careful consideration of this power, it will clearly appear that it was essentially necessary to give it to Congress, as, without it, there could have been no security for the general government against the State legislatures."

The adoption of the constitution was most successfully resisted in North Carolina, and in the debates of the North Carolina Convention of 1788, which declined, by a large majority, to ratify the constitution until it should have been amended, we find the electoral provision, now under discussion, defended with great force by the friends of the constitution, and vehemently attacked by its enemies.

Governor Johnston, president of the convention, a a friend of the constitution, but not of this clause, said (4 Elliott, 50):

"The reason urged is that every government ought to have the power of continuing itself, and that, if the general government has not this power, the State legislatures might neglect to regulate elections, whereby the government might be discontinued."

James Iredell (Do., 54) did

"not object to the recommendation, similar to that of other States, that this power in Congress should only be exercised when a State legislature neglected, or was disabled from, making the regulations required."

The same (substantially) was urged by Archibald Maclaine (Do., 68) and by William R. Davie. Governor Davie's arguments deserve consideration, not only by reason of their cogency of persuasion, but especially because he had been a member of the Federal Convention; and, although his name is not affixed to the constitution, he was one of the most urgent of its advocates.

Mr. Davie said (Do., 59):

"The gentleman from Edenton (Mr. Iredell) has pointed out

the reasons of giving this control over elections to Congress, the principal of which was to prevent a dissolution of the government by designing States. * * *

"Another principal reason was, that it would operate in favor of the people against the ambitious design of the Federal Senate. I will illustrate this by matter of fact. The history of the little State of Rhode Island is well known. An abandoned faction have seized on the reins of government, and frequently refused to have any representation in Congress. If Congress had the power of making the law of elections operate throughout the United States, no State could withdraw itself from the national councils without the consent of a majority of the members of Congress. Had this been the case, that trifling State would not have withheld its representation. What once happened may happen again; and it was necessary to give Congress this power to keep the government in full operation. It would have been a solecism to have a government without *any means* of self-preservation. The confederation is the only instance of a government without such means, and is a nerveless system, as inadequate to every purpose of government, as it is to the securities of the people of America. When the councils of America have this power over elections, they can in spite of any faction in any particular State, give the people a representation."

Mr. Davie recurred to this illustration again (pp. 65, 66) thus:

"It is a fact well known, of which, perhaps, he may not be possessed, that the State of Rhode Island has not been regularly represented for years, owing to the character and particular views of the prevailing party. By the influence of this faction, who are in possession of the State government, the people have been frequently deprived of the benefit of a representation in the Union, and Congress often embarrassed by their absence. The same evil may again result from the same cause; and Congress ought therefore to possess constitutional power to give the people an opportunity of electing representatives, if the States neglect or refuse to do it."

Amendments were proposed to this provision by Massachusetts (1 Elliott, 322), South Carolina (Do., 325), New Hampshire (Do., 326), New York (Do., 329, 330), Rhode Island (Do., 335, 336), Virginia (3 Elliott, 661), and North Carolina (4 Elliott, 246). These were all substantially directed to the same end, viz., the limitation of the power of Congress to the case of the refusal or neglect of the States to act.

Massachusetts and South Carolina stood shoulder to shoulder in this effort, and their resolutions may be quoted as illustrative of the perils then supposed to be involved, and of the circumstances in which it was thought the provision ought to be enforced.

Thus, in Massachusetts, it was recommended, with a standing resolution to procure a corresponding amendment of the constitution:

"That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress agreeably to the constitution."

And, in South Carolina, it was recited and resolved thus:

"And, whereas, it is essential to the preservation of the rights reserved to the several States and the freedom of the people, under the operations of a general government that the right of prescribing the manner, time, and place of holding the elections to the Federal legislature, should be forever inseparably annexed to the sovereignty of the several States—this convention doth declare that the same ought to remain in all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the general government,

except in cases where the legislatures of the States shall refuse or neglect to perform and fulfill the same according to the tenor of the said Constitution."

New Hampshire proposed the same alteration as the convention of Massachusetts, and New York adopted the same, with the further limitation that such Federal control should be of limited duration, viz.:

" and then only until the legislature of such State shall make provision in the premises, provided that Congress may prescribe the time for the election of representatives.'

And New York ratified the constitution in the full confidence that until a convention should be called, and convened to propose amendments to the constitution,

"that the Congress will not make or alter any regulation in this State, respecting the times, places, and manner of holding elections for senators or representatives, unless the legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that in those cases such power will only be exercised until the legislature of this State shall make provision in the premises."

The action of Rhode Island was in all respects like that of New York.

In Virginia and North Carolina it was proposed

"That Congress shall not alter, modify, or interfere in the times, places, and manner of holding elections for senators and representatives, or either of them, except when the legislature of any State shall neglect or refuse, or be disabled, by invasion or rebellion to prescribe the same."

None of these amendments were adopted. They are merely historical monuments of the jealousy our fathers

entertained of any unnecessary invasion of State rights, and of their final persuasion, after debate, that none was to be apprehended. Judge Story says (1 Story on Const., § 827):

"Several of the States at the time of adopting the constitution proposed amendments on this subject, but none were ever subsequently proposed by Congress to the people; so that the public mind ultimately acquiesced in the reasonableness of the existing provision."

We can not mistake the meaning of this debate and this result. It was, by this clause, intended to establish a distinct power in the Federal government, to provide for its own perpetuation, by the passage of electoral laws operating directly upon the people, and not through the agency of the States. The evil feared, by the friends of the Constitution, was the indifference or hostility of the States. The remedy adopted was the power of Federal electoral action; the right to fix distinct times and places, and to establish a suitable manner of electing members of Congress; to do this independently of, not dependently upon the States. But to satisfy the friends of State rights, this power was left with the States until Congress should take it away. And the proposed amendments clearly indicate that the proposition was so reasonable and necessary, that the only modification suggested was, that it would be best to limit the action of Congress, in express terms, to cases of neglect or refusal, by any State, to make proper provision for congressional elections, and this, though supported by the majority of the thirteen States, was finally abandoned, because (proba-

bly) of the reason assigned by Mr. Madison in the Virginia convention, the improbability of congressional interference as long as the States should do their duty.

What reason can be given for the contention that the Federal government may enforce its election laws through the agency of State officers, which does not apply with equal or greater force to every other power it possesses? With greater force, we say, in many instances, for the Federal power to regulate the manner of holding elections is more clearly exclusive than many others. Being in terms given to enable Congress to supersede State laws, it is more obviously exclusive than if the States had not been permitted to legislate at all upon the subject.

The reasons for this grant of power having been thus shown, by contemporaneous history, to have been to preserve continued national governmental existence as against State indifference or hostility, and the method established being that of Federal legislation in partial or total substitution of Federal for State agencies, it would seem to follow as a matter of course that Congress can not make use of State officers for this purpose, or punish for derelictions of duties imposed by State laws. The means must correspond to the end. The Federal government exercises only Federal authority, and must employ only Federal officers and agencies.

A long line of unbroken authority sustains this position. This Court has been equally careful to preserve Federal power from State impairment, as in *McCulloch* v. *Maryland*, 4 Wheat. 316, and the many cases which follow it, and State authority from Federal intrusion, as in *Collector* v. *Day*, 11 Wall. 113. And this has been done by

carefully limiting the power of each to its appropriate sphere, there to work with full force and vigor, through its separate and distinct means and agencies.

Judge Story, in *Prigg* v. *Pennsylvania*, 16 Peters, 616, repels the idea that the States shall execute Federal power in these vigorous sentences:

"On the contrary, the natural, if not the necessary, conclusion is that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution. The remark of Mr. Madison, in the Federalist, No. 43, would seem, in such cases, to apply with peculiar force. 'A right,' says he, 'implies a remedy; and where else would the remedy be deposited, than where it is deposited by the constitution?'—meaning, as the context shows, in the government of the United States."

And, upon page 622, he says:

"We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon the magistrates, while a difference of opinion has existed, and may still exist, upon the point, in different States, whether State magistrates are bound to act under it, none is entertained by this Court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

We need not cite further from these cases, for the principle has never been more clearly stated than by this Court as now constituted. In *United States* v. *Cruikshank*, 92 U. S. 550, the Chief Justice says (we take the liberty to apply the quotation to this case by italics):

"The people of the United States resident within any State are subject to two governments: one State, and the other national; but there need be no conflict between the two. *The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions.* Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied with an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeit coin of the United States within a State, it may be an offence against the United States and the State; the United States because it discredits the coin; and the State because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them in conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen can not complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, *and within their respective spheres must pay the penalties which each exacts for disobedience to its laws.* In return, he can demand protection from each within its own jurisdiction."

In the next place, we claim that—

IV.

Section 5515 of the Revised Statutes is unconstitutional, because it attempts to punish State officers for official acts and omissions.

Each count of the indictment recites that the petitioner

"was an officer of an election at which a representative in Congress for the first congressional district of Ohio was voted for, to wit, a judge of said election at Precinct 'A,' of the eighth ward of the city of Cincinnati, being a lawful polling place at said election, *he, the said Augustus F. Clarke, having been duly appointed such judge of election, under the laws of the State of Ohio.*"

We make this as a separate point merely for convenience of discussion. It is perhaps no more than an application, by way of illustration, of the principles already stated. We do not claim that State officers are exempt from the duty to support the constitution and laws of the United States, but that, *as State officers*, they can not be required to perform Federal duties, or punished for their non-performance. This follows from the dual nature of the Federal government, which no more allows Congress to impose duties upon State, than the State upon Federal officers.

There may be exceptions to this general statement, but they will be found to be peculiar in their character, and supported by special provisions of the constitution. We shall refer to these more particularly hereafter.

The general proposition for which we contend is amply supported by authority.

The exact question now under discussion was fully considered by this Court, in *Kentucky* v. *Dennison*, 24 Howard, 107, with the result shown in the following quotation from the opinion of Chief Justice Taney:

"The demand being thus made, the act of Congress declares that 'it shall be the duty of the executive authority of the State' to cause the fugitive to be arrested and secured and delivered to the agent of the demanding State. The words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But, looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the Court is of opinion the words, 'it shall be the duty,' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the constitution, which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it is clear that the Federal government, under the constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for, if it possessed this power, it might overload the officer with duties, which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And

we are very far from supposing that, in using this word 'duty,' the statesmen who framed it or passed the law, or the president who approved and signed it, intended to exercise a coercive power over State officers, not warranted by the constitution. But the general government, having, in the law, fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word 'duty,' in the law, points to the obligation on the State to carry it into execution.

"It is true that, in the early days of the government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the general government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the constitution; and laws were passed, authorizing State Courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of the revenue laws, and giving to the State Courts the same authority with the District Court of the United States, to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take the proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were, for some years, exercised by the State tribunals, readily and without objection, until, in some of the States, it was declined, because it interfered with and retarded the performance of duties which properly belonged to them, as State Courts; and, in other States, doubts appear to have arisen as to the power of the Courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the general government, unless especially authorized to do so by the State.

"And in these cases the co-operation of the States was a matter of comity, which the several sovereigns extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State

tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience."

And, again, upon page 109, he says:

"But if the governor of Ohio refuses to discharge his duty, there is no power delegated to the general government, either through the judicial department or any other department, to use coercive means to compel him."

In the case of *Peter Voorhees*, 32 New Jersey, 141, Chief Justice Beasley, commenting upon *Kentucky* v. *Denison*, sums up the objection to this class of legislation thus: (We take the liberty to italicize.)

"But as the executive of a State is not a Federal officer, *the general government can not compel the performance of a function which it has no right to annex to the office.*"

See also, Judge McLean's opinion, in the case of *Joseph Smith*, 3 McLean, 129:

"If the legislature, as is probable, intended to make it the *duty* of the governor to exercise the power granted by Congress, and no more, the executive would be acting by the authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law is unconstitutional and void. *Prigg* v. *Pennsylvania*, 16 Peters, 617."

See also *McCauley* v. *Kellogg*, 2 Woods, 13:

"A Court of the United States will not compel, by injunction,

the officers of a State to execute the laws of the State. To do so would be an attempt by the Court to administer the State government."

An apparent exception to the general proposition is where the State officer, under the constitution, becomes a servant of the Federal government, as where the militia are called into actual active service by the United States. Doubtless he may then be punished by the Federal government for official misconduct, as an offence against the laws of the United States. But this has no application here, where the punishment has been inflicted for an offence against the State. And the right in that class of cases to impose Federal duties upon the militia enlisted by the State is expressly given by the constitution.

Another exception is perhaps furnished by the recent amendments to the constitution, as shown by *United States* v. *Given*, 17 Internal Revenue Record, 190, 195.

The passage of the opinion of Mr. Justice Strong, which, we presume, will be relied on, is upon page 190, as follows:

"The remaining reason advanced in support of the motion in arrest of judgment is that the defendant, being an officer of the State of Delaware, with no powers or duties but such as were prescribed by the constitution and laws of the State, is amenable only to said constitution and laws for any non-performance thereunder.' If by this is meant that a State officer or a person deputed to perform duties on behalf of a State is not amenable to the laws of the United States; that he owes no duties to such laws, and that he is not punishable for violation of them, I can not assent to it. I agree that Congress can not impose upon State officers, as such, Federal duties, but I fail to perceive that the act of 1870 has imposed any new du-

ties upon any State officer. It is, I think, an exploded heresy, that the national government can not reach all individuals in the States. It can not invade State domain. It can not take cognizance of offences against State sovereignty. But where State laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the Federal government (as, for example, to vote, the right of citizenship, or the right to vote so far as it is secured), I have no doubt that Congress may make the non-performance of those duties an offence against the United States, and may punish it accordingly. This is not invading the State domain. It has no reference to violation of State laws. They remain punishable in State courts. Undoubtedly an act or an omission to act may be an offence both against the State law and the law of the United States. Any other doctrine would place the national government entirely within the power of the States, and would leave constitutional rights guarded only by the protection which each State might choose to extend to them. The fault of this objection to this indictment is, it fails to apprehend that the fifteenth amendment secured rights to every citizen, and that it gave Congress power to protect them. It may be that Congress can not provide for the appointment of assessors, registers, or collectors, or the existence of any officers who under State constitutions are necessary to enable persons to qualify for voting, but if they can not, when such officers are appointed, provide that no constitutional discriminations shall be made, the thirteenth amendment is not worth the paper upon which it was written. I can not construct he constitution in such a manner as to give it no effect."

So far from being inconsistent with our position, this opinion supports it, and its logic requires the petitioner's discharge. For he has been convicted of violations of State laws, which, as the learned justice says, "remain punishable in the State Courts," a class of offences of which, as he says, the national government "can not take cognizance."

But if, by force of the thirteenth, fourteenth, and fifteenth amendments, or any of them, in its "appropriate legislation" for the extirpation of slavery and all its consequences, Congress has the authority claimed in the dissenting opinion of Mr. Justice Hunt in the case of the *United States* v. *Reese*, and apparently recognized by Mr. Justice Strong in the passage just quoted, and the amendments are not to be construed merely as negatives of hostile State legislation, but as allowing the Federal government to intervene actively in the control of State affairs whenever distinctions of race, color, or previous condition of servitude may hereafter be attempted by individuals as well as States, it follows that the duty which the State officer performs at an election or elsewhere, in providing equal rights, regardless of color, is a Federal, not a State duty, for a breach of which he may, with propriety, be imprisoned by the Federal judiciary, if such punishment be prescribed by Congress. But the duty, for the breach of which such officer will be thus punished, will not be imposed by a State statute, but by the constitution and laws of the United States. Whereas, as long and as far as Congress does not prescribe "the manner of holding elections for senators and representatives," but leaves it to the States, the execution of the State laws is not a Federal function. And it is, in the nature of things, incontrovertible, that as far as duties have been left by the constitution to be imposed or required by State laws, their performance is a State function, although Congress might, under the contitution, have taken charge of the subject itself, and imposed like duties upon Federal officers.

The principle of the distinction we make is clearly

put in *United States* v. *Reese*, and *United States* v. *Cruikshank*, where the limit of the authority of the United States to punish, under the thirteenth, fourteenth, and fifteenth amendments, is shown to be co-extensive with the Federal duty. As far as the Federal guaranty extends, viz., to protect the right to vote from discrimination on account of "race, color, or previous condition of servitude," Congress may legislate, because thus far only the function is Federal. But beyond the protection of the voter from this class of discriminations, Congress may not legislate. So Congress may assume the duty of making regulations as to "the manner of holding elections for senators and representatives," and when, and as far as, it does, the function becomes Federal. Until then, this is a State function, and its breach is the violation of a State law, for which Congress can not provide punishment.

Another possible exception is suggested by the opinion of Mr. Justice Washington, in *Houston* v. *Moore*, 5 Wheat. 31, in cases where the Federal and State governments have concurrent authority. But this is very clearly inapplicable to the case at bar. For, with regard to elections, the powers are in no sense concurrent. The State is the sole rightful source of authority, until the United States intervene to alter or make regulations of their own. As to these, the Federal power is necessarily exclusive, because legally subversive, to the extent Congress chooses to act, of all State legislation.

V.

The proposition we combat, leads to a violation of the fifth amendment to the constitution.

"Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb."

We do not deny that the same act or fact may be a crime both against the State and the United States. It was so held in *Fox* v. *The State*, 5 How. 410; *United States* v. *Marigold*, 9 How. 560; *Moore* v. *The People*, 14 How. 13. The reason is given in the passage we have already quoted from the opinion of the Chief Justice, in *United States* v. *Cruikshank*.

Wherever the same act or fact presents different aspects, or involves duties of different characters, it is clear, that as it may involve a breach of more than one duty, these may constitute more than one crime, and, at the same time, be crimes against the State and the Nation. But the same breach of duty can not constitute more than one crime.

The same rule is applied, by the weight of authority, to acts in violation, at the same time, of State and municipal legislation.

In *Mayor* v. *Allaire*, 14 Ala. 400, Chief Justice Collier says:

"The offence against the corporation and the State, we have seen, are distinguishable and wholly disconnected, and the prosecution of the suit of each proceeds upon a different hypothesis; the

one contemplates the peace and good order of the city, the other has a more enlarged object in view—the maintenance of the peace and dignity of the State."

But, in the same opinion, the learned Chief Justice recognizes the fitness and necessity of each such authority inflicting its own punishment:

"So far as an offence has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it."

That "jeopardy of life and limb" embraces cases like this of imprisonment is shown by

Ex parte Lange, 18 Wall. 163.

People v. *Goodwin*,, 18 Johns. 187.

As it can not be denied that the States retain the right to punish, as crimes, violations of duty required by State laws, notwithstanding section 5515 of the revised statutes, it necessarily follows that section 5515 may have the effect to subject the same person twice to "jeopardy of life or limb" for the same offence.

For the effect of section 5515 is not to make of the same act or fact two breaches of duty, two crimes, one against the Federal, the other against the State government, but to make the same breach of duty, the single crime, an offence against both governments, and twice punishable. When, therefore, Congress attempts to add a penalty, not for the same act or fact, but for the same violation of duty, for the same offence, its legislation is necessarily unconstitutional, because in violation of the fifth amendment.

We admit, of course, that the fifth amendment affects only Federal courts and Federal legislation. The principle established in the case of *Justices* v. *Murray*, 9 Wall. 274, proves that it prevents a conviction in the courts of the United States after a trial for the same offence in a state court. See also *Houston* v. *Moore*, 5 Wheat. 31. It would confine its beneficial effect, however, within altogether too narrow limits to say that it merely prevents two convictions, and does not annul the legislation which makes such convictions possible. Neither the letter nor the spirit of the amendment sustains such a proposition. Its scope is not limited to the prevention of double judgments; it operates upon and annuls legislation which may have the effect to subject any person for the same offence to *jeopardy*. The language is broad, not narrow, and, being in the nature of a bill of rights, added to the constitution as such by way of amendment, must receive liberal construction. The accused shall not be *subject* to be put in jeopardy, is its mandate, not merely that he shall not be more than once convicted or punished. Putting him on trial subjects him to jeopardy, and the law which requires this is therefore clearly unconstitutional. Cooley Const. Lim. *326. He is not only entitled not to be twice convicted, but not to be twice tried.

In *Kleinschmidt* v. *Dunphy*, 1 Montana, 126, it is said of the *seventh* amendment, that,

"the restriction is general and applies to all the departments of the general government alike, especially to the legislative and judicial branches, to whom are assigned the functions of enacting and of construing the laws, so that neither can the Congress, by law, nor the national Courts, by their rules or in their practice, deny to a citizen the right thereby secured."

VI.

The laws of Ohio did not impose upon the petitioner the pretended duties for disregard of which he was convicted.

The *first* count of the indictment, on its face, might appear to charge a breach of duty. But this is merely apparent, not real. It charges that having, as a judge of election at precinct A, of the eighth ward, of Cincinnati, been placed in charge of a sealed poll-book of the election, for transmission to the clerk of the Court of Common Pleas,

"he did neglect to carry said poll-book, *thus sealed*, to the said clerk at his office."

If it were possible to construe this as if the words "thus sealed" were omitted, it would, doubtless, charge a breach of duty. But these words are used and were necessary, and, in fact, constitute the substance of the pretended crime. This appears from the charge of the Court as shown by the bill of exceptions. The Court instructed the jury to convict, although the accused did, in fact deliver the poll-book to the clerk, within the time prescribed by law, if, by his negligence or permission, the seal was broken while the poll-book was in his hands.

So the *second* count charges directly that the accused

"did permit the same to be broken open, before he conveyed the same to said clerk."

Our contention is, that the "duty in regard to such

elector, required" of Clarke by the laws of Ohio, was to convey the poll-book to the clerk within two days. This he did. The act is highly penal, and can not be construed liberally. The 19th section of the Ohio statute (*ante*, p. 6) makes it the duty of the judges of election, after canvassing the votes, to

"put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county where the return is to be made; and the poll-book, *thus sealed and directed* shall be conveyed by one of the judges * * * to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election; and the other poll-book * * * shall be deposited with the township clerk," etc.

We have italicised the words which give rise to the present controversy. Two poll-books are provided for—one of these must be sealed and directed to the clerk; this book is to be conveyed to the clerk of the Court of Common Pleas; the other to the township clerk. This is the meaning of the act. The words, "thus sealed and directed," do not involve a mandate that the officer shall not open the book, but merely distinguish this from "the other book." "Thus sealed and directed" are in the past, and relate to and describe the particular book which the law had required to be so treated, whereas the Court below read them prospectively, and as if containing a mandate or injunction to be enforced in the future, as if it read,

"the book which he shall keep and maintain in the 'sealed and directed condition' in which it had been placed."

Neither law nor grammar permits this construction.

Not law, because this is to make a crime by construction, to give to a penal law the effect of a remedial statute; not grammar, for this converts the past into the future, and makes a mandate of conduct out of a description of condition.

The legal fact is that this case fell when the *third* count was abandoned. If Clarke was guilty it was because he knowingly did

"acts thereby unauthorized, with intent to affect any such election, or the result thereof."

And accordingly the *third* count, under that particular of the 5515th section, charged that after the receipt of the poll-book he

"did permit the same to be opened and changed, with intent to affect such election."

Had this been done "knowingly," and the petitioner so convicted, the present proposition would not be made, for the laws of Ohio authorize no such act. But we see no ground whatever to maintain the present conviction. It was his duty to convey the poll-book he received; and he did receive the poll-book which had been "thus sealed and directed," but under the charge of the Court he was convicted, although he delivered the very book he received, the poll-book which had been "thus sealed and directed."

For these reasons, we ask for the discharge of the prisoner.

Respectfully submitted,

HOADLY, JOHNSON & COLSTON,

Of Counsel for petitioner.

CINCINNATI, OHIO, *October* 1, 1879.

Supreme Court of the United States.

OCTOBER TERM, 1879.

IN THE MATTER OF AUGUSTUS F. CLARKE, PETITIONER FOR DISCHARGE UPON THE WRIT OF HABEAS CORPUS.

SUPPLEMENTAL BRIEF FOR PETITIONER.

By Hoadly, Johnson & Colston,
R. T. Merrick,
His Counsel.

Judd & Detweiler, Printers.

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I.

Upon the point of practice growing out of the order of Mr. Justice Strong, transferring this case for hearing to this Court, (Record, 19,) we direct attention to the fact that the petition is addressed to this Court, (Record, 1;) that it was presented to Mr. Justice Strong, and the writ allowed, and subsequent action taken by him not as circuit justice, but as a justice of this Court, and that the writ was issued by the Clerk of this Court, under its seal, and served by its marshal. Even if any of these steps be irregular they are not void, and can only be set aside upon motion, or by the Court *suo motu*, so that if our client be entitled to his discharge upon the merits, nothing remains but to enter the order to that effect.

Section 752 gives to the—

"Several justices and judges of the said courts, within their respective jurisdictions, * * * power to grant writs of habeas corpus."

The said courts are:

"The Supreme Court and the circuit and district courts."

Each of your honors occupies a dual position, each is a justice of the Supreme Court and a circuit justice. As justice of the Supreme Court, the jurisdiction of Mr. Justice Strong is coterminous with the boundaries of our country; as circuit justice, it does not extend beyond the limits of the circuit to which he has been assigned.

As circuit justice, he may exercise *original* jurisdiction in the grant of a writ of habeas corpus. As justice of the Supreme Court, he has no such *original* jurisdiction. It is denied to the Court, (Constitution, art. 3, sec. 2.) It is therefore denied to its members. If a justice of this Court, therefore, in his capacity as circuit justice, grant a writ of *habeas corpus*, it is the exercise of *original* jurisdiction, and the case cannot be transferred to this Court except by appeal. To this effect, and no more, is *Kaine's case*, (14 How., 116,) as is shown by Judge Catron's carefully selected language:

"After this careful consideration of the case in open court, the *circuit judge* granted a second writ of *habeas corpus*, * * * and the matter was again brought before that judge at chambers, but not deeming it proper to act, he adjourned the proceedings as presented to him into this Court, and of the case thus presented we are called on to take jurisdiction. Cognizance could only be taken of the matter on the assumption that original jurisdiction existed in the *circuit judge* to act, but on which he did not act; and the case comes here as one of original jurisdiction, which we are called on to exercise; and as the Constitution declares that this Court shall only have appellate power in cases like this, it follows that the transfer made *by the circuit judge* is of no validity, and must be rejected."

Unless, therefore, this Court is now prepared to hold that section 752 is unconstitutional in its attempt to confer upon the justices of the Supreme Court as such power to grant writs of *habeas corpus*, or that it must receive a limited

construction, viz., that this power is given to your honors not as justices of the Supreme Court, but as circuit justices only, it follows that Congress has conferred appellate power upon each of you, to be exercised throughout your respective jurisdictions as justices of this Court, viz., the whole country. But there is nothing in the Constitution to prevent the delegation of appellate power to each of you, and, in point of fact and law, each of you is now clothed with a large share of the appellate power of this Court, viz., the power to grant writs of *ne exeat* and injunctions, (Rev. St., sections 717, 719.)

1 Martin v. Hunter, 1 Wheat. 337 & 8,

And, as to any attempt to limit the force of section 752 by construction, the letter of the law is plainly in the way. The power is given to the "several justices of the said courts," viz., "the Supreme Court *and* the circuit and district courts."

And this explicit grant of power cannot be withdrawn by any construction short of that which denies that the power is given to the "justices of the Supreme Court." But this is the exercise of a legislative function, for it repeals the section; and not of judicial construction.

The remaining question now becomes easy. No one will deny that a circuit justice or judge may grant a writ of *habeas corpus* at chambers, and adjourn the hearing into court. It is every-day practice to transfer litigated matters from court to chambers, and *vice versa*. Injunctions are daily granted at chambers and dissolved in court.

Mr. Jarman, (Chancery Practice, 340,) says:

"Sitting in open court, the judge may adjourn, for consideration in chambers, any matter, which, in his opinion, may be more conveniently disposed of in chambers; or, sitting in chambers, may direct any matter to be heard in open court. (15 and 16 Viet., c. 80, s. 27.) The judge has full discretion either to dispose of a matter in chambers which is already there, or to adjourn it into court. (*Re The Agricultural Cattle Association Company*, 11 W. R., 330, 386.")

So also, at law, Mr. Justice Lush says:

"The *common* law appears to vest in a single judge the same equitable jurisdiction over the proceedings in a cause which it vests in the court of which he is a constituent member. His act therein is potentially the act of the court; for, although he cannot directly enforce the order he makes, nor exercise any of what may be termed the *prerogative* powers of the court; yet, the court will adopt his orders, and for disobedience thereto, when so adopted, will issue process of attachment, as if the matter had been originally ordered by the court itself." (Lush's Practice, Sir James Stephen's ed., 668.)

We respectfully submit that a justice of the Supreme Court may grant a writ of *habeas corpus*, in vacation, and that he may adjourn its hearing into the court—that, therefore, the action taken by Mr. Justice Strong in the premises is in strict conformity to law.

III.

In addition to the propositions contended for in our original argument, we ask the court to hold, that section 5515 is unconstitutional, because it attempts to punish all derelictions of duty by—

"Every officer of an election, *at which* any representative or delegate in Congress is voted for"—

Whether such breaches of duty affect the election of such representative or delegate in Congress or not. Under section 5515 the election officers are just as liable to punishment if their omissions or breaches of duty only affect the choice of State, county or municipal officers, voted for at such election, as if they relate to the election of members of Congress.

Mr. Madison prophesied, in the Virginia Convention, that if the elections for Representatives in Congress—

"Be regulated properly by the State Legislatures, the Congressional control will, very probably, never be exercised."

And so satisfactory was the management, by the States, of this subject, that it was not until 1870 that any attempt was made to exercise the reserved power of the Federal Government over it. During this long period the practice grew up and became the general custom of the country, incorporated into the laws and Constitutions of the States, to elect Representatives in Congress at the same time and place, and upon the same ticket with State, county and municipal officers. They were not treated as agents of an alien or hostile government, but as representatives of the same people, and in the same sense, although with different powers, as are governors, State judges, and other agents of the popular will. Thus, at the election at which Clarke officiated as judge, in 1878, in pursuance of the constitution and laws of Ohio, there were voted for, on the same ticket with the Representative in Congress, the following State and county officers, viz., one judge of the Supreme court, one member of the State Board of Public Works, a sheriff, probate judge, prosecuting attorney, county commissioner, and coroner of Hamilton county. Ohio is one of the States governed by the sixth section of the act of March 3, 1875, (18 Stat. at large, 400,) and not by section 25 of the Revised Statutes, and still elects its State and county officers and Representatives in Congress on the second Tuesday of October, (1 Swan & Critchfield's Statutes, 532, Constitution of Obio, art. 2, sec. 2; art. 3, sec. 1.) The record does not show the real wrong supposed to have been done by Clarke, but no one familiar with the facts will venture to affirm that it had any bearing upon or relation to the election of Representative in Congress. Had he been tried upon the *third* count of the indictment, the district attorney would have been compelled to admit that Clarke was not guilty of permitting the poll book—

"to be opened and changed with intent to affect *such* election"—

in the sense that he permitted any change with intent to

affect the election of Representative in Congress, but to claim that in other particulars, viz., with reference to the votes given at "such election" for probate judge, prosecuting attorney, and county commissioner of Hamilton county, he permitted it to be changed.

This statement, known to Judge Swing, to District Attorney Richards, and to the writer of this brief to be true, and which the Attorney General can easily verify, is not submitted to this Court as a matter of fact derived from the record in order to impeach the sentence of the petitioner in this case. Our statement is true, but were it not, it cannot be denied that the fact might so happen, and it is therefore fairly illustrative of the effect of this statute.

Admitting, as we do, that Congress has plenary power, by law, to make, and, by the appropriate agencies of the Executive Department of the Federal Government, to execute "regulations" of the "times, places and manner of holding elections for Senators and Representatives," and to enforce these by punishment for disobedience, it seems, nevertheless, clear to us that a law, under which an officer of a State, county or municipal election, may be punished by imprisonment under the sentence of a Federal circuit court, although he did his full duty in the matter of electing a Representative in Congress, because he failed, at the same election, honestly to receive, count and return, all the votes given for a State governor, or a county coroner, or a city mayor, is unconstitutional and void. It is within the following condemnation applied to another act of the same Congress, this Court, in *United States* vs. *Reese*, 92 U. S., 214. Fortunate, indeed, it is, for the liberties of our country, that this greedy legislature bit so eagerly at the shadow that they dropped the meat:

"*Held* that the *third* and *fourth* sections of the act of May 31, 1870, (16 Stat., 140,) not being confined in their operation to unlawful discrimination on account of race, color or

previous condition of servitude, are beyond the limit of the fifteenth amendment, and unauthorized.

"As these sections are in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, and cannot be limited by judicial construction, so as to make them operate only on that which Congress may rightfully prohibit and punish, *Held* that Congress has not provided by 'appropriate legislation' for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent."

Section 5515 can only be reconciled to the Constitution by substituting the words "in regard to the election of Representative in Congress" for the words "in regard to such election. The phrase, "such election," as here used, is not the election of a Representative in Congress, but is "an election at which any representative in Congress is voted for."

Respectfully submitted,

HOADLY, JOHNSTON & COLSTON,
R. T. MERRICK,
Attorneys for Petitioner.

WASHINGTON, *October* 15, 1879.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 6—ORIGINAL.

EX PARTE AUGUSTUS F. CLARKE. APPLICATION FOR HABEAS CORPUS.

BRIEF FOR UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

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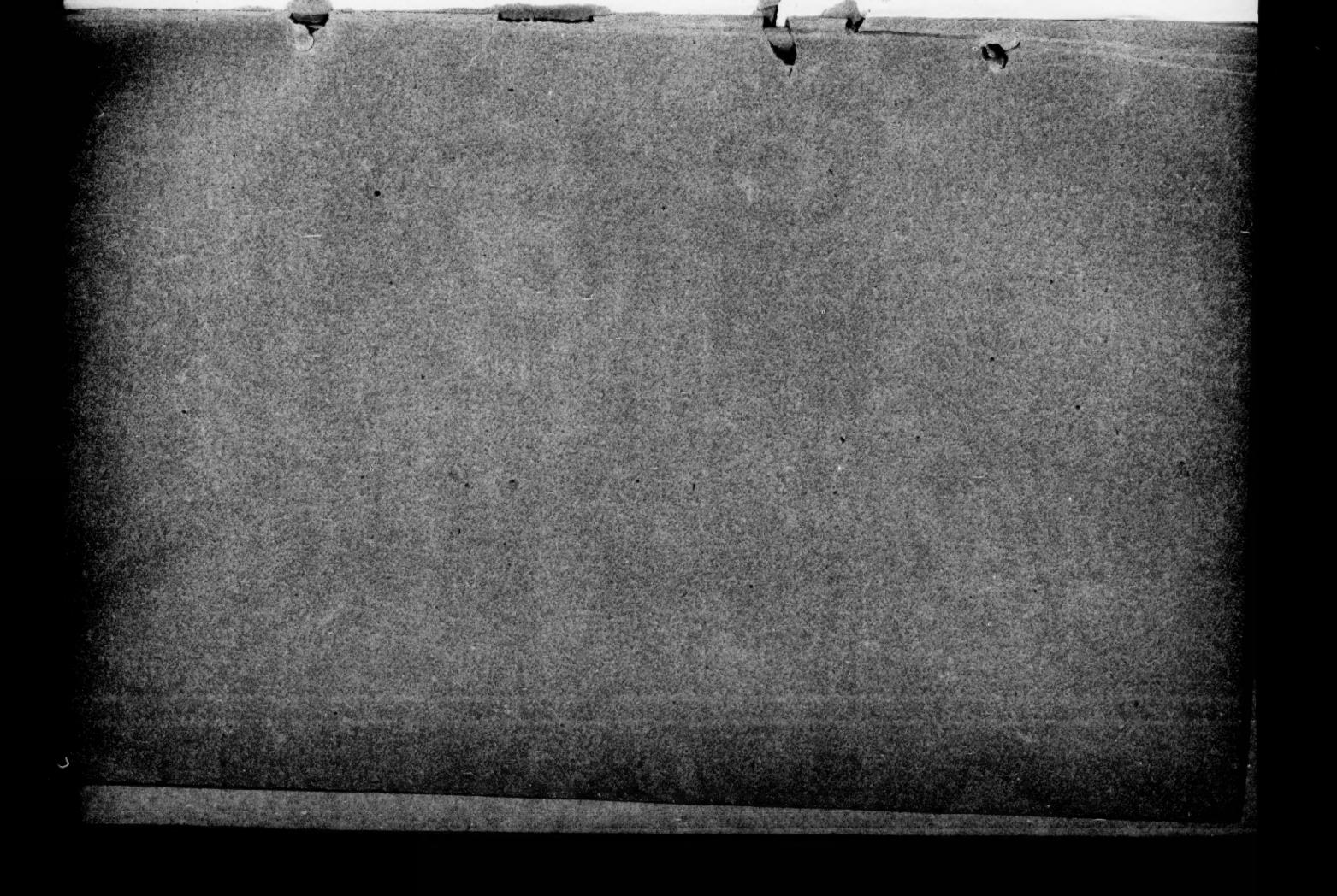

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

EX PARTE AUGUSTUS F. CLARKE. APPLICATION FOR HABEAS CORPUS.

BRIEF FOR UNITED STATES.

In this case, upon the petition of Augustus F. Clarke, addressed "to the honorable judges of the Supreme Court of the United States," for a writ of *habeas corpus* in his behalf, the writ was allowed by Mr. Associate Justice Strong during vacation of the Supreme Court, and directed to be made returnable before him forthwith at the Catskill Mountain House, in Greene County, New York. Thereupon, on the 4th of August, 1879, a writ of *habeas corpus* was issued by the clerk of the Supreme Court, returnable as aforesaid. Return having been made to the writ, with the production of the body, it was (on August 11, 1879), ordered "that the hearing of the cause be postponed into the Supreme Court of the United States, there to be heard upon the second Tuesday of October, 1879," and it was also further ordered "that the petitioner be admitted to bail in the sum of five thousand dollars, with two sureties, freeholders of the district, approved by the clerk of the circuit court of

the United States for the southern district of Ohio, to abide the rule of the Supreme Court in the premises."

But, presuming that in view of the ruling of the Supreme Court in the case of *In re* Kaine, 14 How., 103 (namely, that a single justice, in vacation, cannot issue a writ of *habeas corpus* and remit the cause to that court for decision), cognizance will not be taken of this matter by the Supreme Court under the writ already awarded by Justice Strong, and anticipating that the action of the court will be ultimately invoked by counsel for the petitioner as upon a petition *de novo* for the issuance of a writ of *habeas corpus*, the matter is here treated as one before the court on a new application for the writ upon the grounds presented in the original petition.

The petitioner sets forth in his petition that he is and has been for nearly six years last past a member of the city council of the city of Cincinnati, Ohio, and that as such member he is and has been during that time charged by law with the duty of being one of the judges of election at all State, Congressional, county, and municipal elections held within said city for a certain precinct; that at the regular State, Congressional, and county election held on the second Tuesday of October, 1878, within said city, he acted as one of the judges of election for said precinct; that afterwards in the circuit court of the United States for the sixth circuit and southern district of Ohio, on the 24th day of October, 1878, he was indicted for unlawfully neglecting to perform the duty required of him as such judge of election by the laws of the State of Ohio in regard to said election, and also for violating a duty required of him as such judge of election by the laws of said State in

regard to said election; that at the February term, 1879, of said court, he was tried and convicted upon the indictment; and that he was sentenced by said court to be imprisoned in the jail of Hamilton County, Ohio, for twelve months, and to pay a fine of two hundred dollars and the costs of the prosecution; in pursuance of which sentence the petitioner is imprisoned, etc.

He further alleges in his petition that the said court was without jurisdiction in the premises; and he annexes to his petition a certified transcript of the record and proceedings in the circuit court.

The record shows that the petitioner was convicted on two of the counts of the indictment against him, namely, the first and second.

The *first* count charges that he, being an officer of an election at which a Representative in Congress for the First Congressional District of Ohio was voted for, duly appointed such under the laws of the State of Ohio—

"did then and there unlawfully *neglect to perform a duty* required of him by the laws of said State in regard to said election, in that one of the poll-books of said election having been put under cover and sealed by the judges of election at said polling-place, and directed to the clerk of the court of common pleas of Hamilton County, as required by law, and he, the said Augustus F. Clarke, one of said judges as aforesaid, having been selected by said judges to convey said poll-book to said clerk, and having accepted said poll-book sealed and directed as aforesaid for the purpose of conveying the same to said clerk, did neglect to convey said poll-book thus sealed to the said clerk at his office; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The *second* count charges that he, being an officer of election as aforesaid—

"did then and there *violate a duty* required of him by the laws of said State in regard to said election, in that one of the poll-books of said election having been put under cover and sealed by the judges of election at said polling place, and directed to the clerk of the court of common pleas of Hamilton County, and he, the said Augustus F. Clarke, one of the judges as aforesaid, having been selected by said judges to convey said poll-book to said clerk, and having accepted said poll-book sealed and directed as aforesaid, for the purpose of conveying the same to said clerk, did permit the same to be broken open before he conveyed the same to said clerk; contrary to the form of the statute," etc.

Both of these counts are framed upon section 5515 of the Revised Statutes. The following presents so much of that section as is applicable thereto:

"*Every officer of an election* at which any Representative * * * in Congress is voted for, * * * appointed or created by or under * * * any State * * * law or authority, who *neglects* * * * *to perform any duty*, in regard to such election *required of him by any law* * * * *of any State* * * * or who *violates any duty so imposed*, * * * shall be punished as prescribed in section fifty-five hundred and eleven."

The application for the writ of *habeas corpus* is grounded on the alleged invalidity of the statutory provisions under which the petitioner was indicted, and which are given above.

It appearing by his petition that the petitioner is imprisoned pursuant to a judgment of the circuit court of the United States for the southern district of Ohio, pronounced in a criminal proceeding against him under a statute of the United States, a preliminary inquiry

arises here, viz, *Whether the petitioner can be relieved by means of the writ of* HABEAS CORPUS *on the ground on which the application is made.*

I.

In regard to the preliminary question mentioned we submit—

1. The circuit court, having "cognizance of all crimes and offenses cognizable under the authority of the United States" (R. S., sec. 629), had jurisdiction of the cause, and its judgment therein cannot be re-examined by *habeas corpus.*

The jurisdiction of the circuit courts of the United States, in criminal cases, is by virtue of section 629, Revised Statutes, so broad, that it is co-extensive with the judicial power of the United States in regard to such cases. Extending to "all crimes and offenses cognizable under the authority of the United States," it necessarily embraces all cases of that character which arise "under the Constitution and laws of the United States." And as the judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants of the Constitution (Ableman *vs.* Booth, 21 How., 520; Mayor *vs.* Cooper, 6 Wall., 252), so the jurisdiction of the circuit courts extends to all crimes and offenses created by any legislative act of Congress. Hence, in a criminal proceeding under an act of Congress, jurisdiction of the *cause*—that is, the right to take cognizance thereof and to decide all questions of law occurring therein, even the question of the valid-

ity of the act under which the proceeding is had—is acquired by the circuit court simply by the fact of the existence of such an act and the allegation of an offense under it.

The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action.

United States *vs.* Arredendo, 6 Pet., 709.
See also Cent. Pac. R. R. Co. *vs.* Placer Co., 43 Cal., 368–9.
Ex parte Bennett, 44 Cal., 88.
Ex parte Tracy, 25 Vt., 93, 96.
Ex parte Greenough, 31 Vt., 279, 285.
Ex parte O'Connor, 6 Wis., 288.
King *vs.* Poole, 36 Barb., 242.
Sheldon *vs.* Newton, 3 Ohio St., 499.
Ex parte Kellogg, 6 Vt., 509, 511.

The writ of *habeas corpus* has not the scope nor does it perform the office of a writ of error or appeal. When it is alleged that a prisoner is in custody by virtue of legal process, the existence of the process and its validity upon its face become a legitimate subject of inquiry under the writ of *habeas corpus*. So matters which entitle a prisoner to his discharge, such as the expiration of the period of time for which he was sentenced, a pardon, or payment of the fine imposed as punishment, are subjects upon which the judge issuing the writ may hear proof, and when established constitute good cause for the prisoner's discharge. But there can be no re-examination of any matter that goes to the grounds of the judgment upon which the commitment was made.

People *vs.* Cavanagh, 2 Parker's C. C., 650.

Thus, in *Ex parte* Fisher (6 Neb. R., 309), where on *habeas corpus* it appeared that the prisoner was detained by the judgment and commitment of a justice of the peace in a criminal action under a license law of the State—the justice having jurisdiction thereunder where the penalty did not exceed a certain sum—the court was asked to discharge the prisoner on the ground of the invalidity of the law. But the court dismissed the writ and remanded the prisoner, holding that *habeas corpus* is not a proper proceeding to review the judgment under which he was detained.

In the opinion of the court in that case (which is exactly in point here) it is remarked that, "after judgment and commitment in a criminal action by an inferior court having jurisdiction of the offense charged, we think that *habeas corpus* is not the proper mode of procedure to bring the cause into this court for review upon alleged errors of law; for it seems to us that, when the validity of a statute is controverted, the controversy raises a legal question, which, like all other legal questions raised on the trial of a cause in an inferior court, can be reviewed only by the mode prescribed by law. To entertain jurisdiction in such case upon a writ of *habeas corpus*, it would be necessary to look beyond the judgment and re-examine the charges upon which it was rendered, as well as to review the questions of law raised on the trial and decided by the inferior court. If such practice were to obtain, then, indeed, every conviction for a criminal offense might be brought here for review on a writ of *habeas corpus*. We think it is not within the province of this court to open the door to such a system of practice. And we are not prepared to say that, upon a writ of *habeas corpus*, we can look beyond the judgment and re-

examine the charges on which it was rendered, or pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law."

So, in the matter of J. A. Harris (47 Mo., 164), which was a petition for *habeas corpus*, it was held that where one has been arrested on legal process by a court having jurisdiction of the person and the offense, and is in custody of the proper officer, the constitutionality of the law under which he was arrested will not be inquired into on a writ of *habeas corpus*.

Agreeably to this doctrine it has been recently held by the Supreme Court of the United States that where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from the Supreme Court, the latter court will not on *habeas corpus* review the legality of the proceedings.

Ex parte Parks, 93 U. S., 18.

The court there observes: "To review the decision of that court (a district court of the United States) by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court."

So, in *In re* Callicott (8 Blatch., 89), which was an application for a writ of *habeas corpus*, made to the circuit judge of the second circuit, alleging that the petitioner was in prison under sentence of the circuit court of the

United States, pronounced in the eastern district of New York in a criminal prosecution under a statute of the United States, &c., the judge (Woodruff), upon examination of authorities, held that he had no jurisdiction to review the judgment of the circuit court. "That court," he observed, "had jurisdiction of the matters charged in the indictment, and to determine whether the acts therein alleged constituted an offense against the laws of the United States, and, by the aid of a jury, to try and determine whether the petitioner was guilty of those acts. From the judgment of that tribunal no appeal lies to me as judge. No writ of error lies to me; and, if my opinion was that the learned judges by whom the court was held when the judgment was pronounced committed an error, I have no power to revise or to reverse the judgment."

If a judgment is absolutely *void*, then *habeas corpus* would lie to release one from imprisonment under it; if good until reversed, as is the case here, *habeas corpus* will not prevent its execution. (See 3 Peters, 202; Ex p. Bushnell, 9 Ohio St., 183; Ex p. Williamson, 26 Penn. St., 9; People *v.* Orser, 12 Howd. Pr. (N. Y.), 550; Ex p. Baker, 11 Howd. Pr., 425–6; Ex p. Prime, 1 Barb., 349, 350; People *v.* Cavanagh, 2 Abb. Pr., 85; People *v.* McCormack, 4 Parker's Crim. Cas., 9; Ex p. Van Aernam, 3 Blatch., 160.)

An examination of the earlier cases decided in the Supreme Court upon *habeas corpus* will show that the court, while it has examined the regularity of proceedings in cases thus brought before it, so far as to ascertain whether the lower court had jurisdiction or has exceeded its authority, it has not passed upon questions of law, constitutional or other, which were properly before the judge at the trial.

See *Ex parte* Watkins, 3 Peters, 193. In this case the court, after reviewing the earlier cases of *Ex parte* Hamilton, 3 Dall., 17; *Ex parte* Burford, 3 Cranch, 477; and *Ex parte* Bollman and Swartwout, 4 Cranch, 75, observes that "in no one of these cases was the prisoner confined under the judgment of a court."

See also same case, 7 Pet., 568; *Ex parte* Kearney, 7 Wheat., 38; and *Ex parte* Metzger, 5 How., 176, in which the court says: "However erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction, and the defendant has been duly committed, under an execution or sentence, he cannot be discharged by this writ" (*habeas corpus*). Ex parte Lange, 18 Wall., 163.

In a later case (Ex parte Jackson, 96 U. S., 727) the court did, upon an application for a *habeas corpus*, pass upon the constitutionality of the act under which the petitioner was imprisoned, and decided that it was constitutional. It is obvious that if such was the opinion of the court, the question whether, if unconstitutional, the court could or would have discharged the prisoner when he had been convicted by a court of competent jurisdiction, did not necessarily arise. The last sentence of the opinion is apparently a waiver of that question.

2. The limitations of the writ of *habeas corpus*, as well as the purpose for which it may be used, are stated at length in section 753 R. S., which is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree

of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

This section applies alike to section 751 and section 752. It defines the powers of the justices, as well as of the courts, who are authorized to issue this writ. When, therefore, it gives by negation (as it undoubtedly does) power to discharge a prisoner who is in custody in violation of the Constitution, or of a law or treaty of the United States, it becomes necessary to inquire what is the meaning of this sentence.

This court has repeatedly held that it will not discharge a prisoner upon writ of *habeas corpus* by reason of any error of law made by the court at the trial, provided the court had jurisdiction of the prisoner and the cause.

Ex parte Parks, 93 U. S., 18, and cases cited.

Yet if an error were committed by such court, it is obvious that the prisoner is detained in violation of a law of the United States. It would be difficult to see any reason why all the law of the trial should not be here investigated (if it may be investigated at all) as that which is strictly constitutional in its character. The same reason exists in the one case that exists in the other. The meaning of the sentence would seem to be that the court must inquire whether or not the prisoner is detained in violation of the forms provided by

the Constitution and laws, as he would be if detained by a court not having jurisdiction; but whether the court having jurisdiction of the cause and the prisoner has made an error in its construction of the Constitution or law cannot be here re-examined. Unless this construction be adopted, as the power to determine whether the prisoner is detained in violation of the Constitution or laws of the United States rests not alone with this court, but with every justice of this or of the district or circuit court, it would follow that after a prisoner had been convicted by the circuit court it would be in the power of the district court to release him because he had been convicted in violation of the Constitution and laws, notwithstanding such court had jurisdiction of the cause, and when, in point of fact, there was simply a difference of opinion between the judge of the district court and the judge of the circuit court. And it is not easy to see either why, if this construction be adopted, and this court now holds that a prisoner is rightfully detained by virtue of the Constitution and laws, any one of the magistrates named in the *habeas corpus* act may not afterwards release him because he is of opinion that the Constitution and laws have been violated.

That man cannot be said to be convicted in violation of the Constitution or the law who is convicted before a tribunal which has general jurisdiction of offenses cognizable under such Constitution and law. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Ex parte Watkins, 3 Pet., 202.

II.

But assuming that the constitutionality of the statutory provisions, under which the petitioner was tried and convicted in the circuit court, may be inquired into in a proceeding on *habeas corpus*, we contend that those provisions are valid, and in support of their validity the following is submitted:

First. Congress has full and unqualified power to regulate the manner of holding elections for members thereof.

This power is derived from section 4, article 1 of the Constitution, which provides: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

From this provision it is that the States themselves derive all their power to enact laws prescribing the time, place, and manner of holding elections for Representatives in Congress; and it will be observed that the power given to Congress touching this subject is as broad as that given to the States. In the grant to the States the language employed would seem to make it imperative upon them to exercise the power conferred; while in the grant to Congress the exercise of the power is left to the discretion of that body. Yet this discretion is subject to no restriction whatever. According to the terms of the grant, Congress may "at any time," by law, *make* regulations prescribing the time, place, and man-

ner of holding such elections, or may *alter* any regulations of that character which have been enacted by the legislatures of the States; and regulations enacted by Congress pursuant to this grant become by the Constitution the supreme law of the land. Therefore should Congress make regulations covering the whole subject-matter of the grant, all State laws on the same subject-matter would thereby be rendered inoperative and void. So if Congress alter the regulations of the States, by the enactment of regulations supplemental thereto or otherwise, only such part of the State regulations would remain valid as were unaffected by the legislation of Congress.

The scope and effect of the provision of the Constitution above quoted are very forcibly presented in a report from the minority of the Committee of Elections of the House, in the Thirty-eighth Congress. (See Reports of Committees of the House, first session Thirty-eighth Congress, No. 60.) Respecting that provision it is there said: It confers all necessary authority over the subject by the terms "to regulate the times, places, and manner of holding elections for Senators and Representatives." It gives to the legislatures of the States and to Congress, both, the *power* to make these regulations; and to Congress, also, the further distinct and important power *to alter at any time* such regulations as the States may make. It *commands* the legislatures of the States to execute the power with which they are invested; but it *confides* to Congress the *discretion* to *exercise*, or not, either of the powers intrusted to it at all times. No legislation of the States can prevent Congress from acting on this subject, either in the form of *making* these regulations or *altering* those of the State legislatures;

nor can the States *qualify* or *circumscribe* that action in the one mode or the other, whatever it may be. But Congress, by executing its power to *make* these regulations, may exclude, and wholly put an end to, the jurisdiction of the State legislatures; or, in exercising its other power *to alter* the State regulations to *any extent*, it may allow that jurisdiction to operate within as large or small limits as it may adjudge to be proper; or it may leave to these legislatures the exercise of all power over the subject by itself abstaining from all legislation relating to it. But when Congress does legislate, either to *make* these regulations or to *alter* such as the State legislatures may have prescribed, just so far as it does act its authority is absolute, paramount, and exclusive. This character would be imparted to its action by the second clause of the sixth article of the Constitution. In addition, the discretionary power with which Congress is invested *to make* these regulations, or to *supervise and alter* those of the State legislatures *at all times*, stamps its legislation in the premises with an overruling supremacy.

This power of Congress to alter the laws of the States is isolated. It is confined to their regulations of the times, places, and manner of holding Congressional elections, and extends to no other class of their legislation. But the authority of the States over this complex matter the Constitution makes subject at all times to the freest exercise on the part of Congress of its power to alter these State laws. When Congress acts there are not two distinct and independent systems of legislation; but by force of the Constitution it becomes one both of blended jurisdiction and legislation; and any alteration it may make of the State laws has the identical effect it

would have if made by the State legislature. The system is simple and harmonious. If Congress pass a law which, either in terms or effect, amounts to an alteration of the State regulations, to its full extent the latter, by operation of the Constitution, give place, and the law of Congress is substituted.

In volume 2 of Curtis's History of the Constitution, referring to the above-quoted section of the Constitution, it is observed: "This provision originated with the committee of detail; but, as it was reported by them, there was no other authority reserved to Congress itself than that of altering the regulations of the States; and this authority extended as well to the place of choosing the Senators as to all the other circumstances of the election. In the convention, however, the authority of Congress was extended beyond the alteration of State regulations, so as to embrace a power to make rules as well as to alter those made by the States. But the place of choosing Senators was excepted altogether from this restraining authority and left to the States. Mr. Madison, in his minutes, adds the explanation that the power of Congress to *make* regulations was supplied, in order to enable them to regulate the elections, if the States should fail or refuse to do so. But the text of the Constitution, as finally settled, gives authority to Congress at 'any time' to 'make or alter such regulations'; and this would seem to confer a power which, when exercised, must be paramount, whether a State regulation exists at the time or not."

See also volume 1, Story on Const., section 815 *et seq.*, wherein are presented the leading considerations for leaving it to the discretion of Congress to determine when and to what extent the power referred to should be exercised. Also the Federalist, Nos. 58 and 59.

Second. The power of Congress to regulate the manner of holding elections for its members includes authority to adopt whatever measures may be deemed necessary or expedient to conducting such elections and determining the result thereof.

It is submitted that if a State should neglect or refuse to make any regulations on the subject of such elections, and Congress should in consequence supply regulations of its own, the latter regulations, in order to effect their purpose, must of necessity embrace the whole process of election; and, in this view, as well might their requirements extend to the registration of voters as to the casting and canvassing of votes. But in the contingencies adverted to (the neglect or refusal of the State) the power of Congress over this subject would be no greater than it would be where such contingencies did not exist, *i. e.*, where regulations were already provided by the State. As these regulations of the State might be wholly superseded by others enacted by Congress in the exercise of that power, so Congress might alter them by making additions thereto or otherwise, in the exercise of the same power; and alterations of State regulations so made by Congress might be limited to any one of the subjects to which such regulations applied (whether it be the registration of voters, the casting or canvassing of votes, the declaration of the result, &c.), or they might be extended to the whole of those subjects.

When the laws of the State as to the election of members of Congress are altered by Congress, these alterations are, as it were, engrafted upon the State laws, so that together they form a complete whole.

The legislation of the State and the legislation of Con-

gress, in regard to such election, are each made under authority derived from a common source, namely, the Constitution of the United States, and have each an immediate relation to a subject that grows out of the Constitution and concerns the existence of the Federal government; but the authority conferred upon Congress over this subject being paramount, and being moreover subject to no restrictions as to the mode or extent of its exercise, it may well be exerted in the way of adopting the State provisions by adding the sanction of a penalty thereto or otherwise.

The regulations of a State government are not the less made or altered by the Federal government when they are adopted by the Federal government as regulations to which officers charged with a duty to the Federal government are to conform, and when compliance with such regulations is enforced by the Federal government by a penalty.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject.

Gibbons *v.* Ogden, 9 Wheat., 207.

Illustrations of this may be found in the acts empowering and directing officers of the United States to conform to and assist in the execution of the quarantine or health laws of the States. (1 Stat., 474, 619.) ※

In Gilman *v.* Philadelphia, 3 Wall., 730, the court says: "It is no objection to distinct substantive powers that they may be exercised on the same subject. * * * In some instances their action becomes blended, in some the act of the State limits or displaces the action of the nation, in others the action of the State is void. * * * The inconsistency between the powers of

※ See further sections 5391 and 722 R.S.

the States and the nation does not necessarily involve collision or any other evil. The public good is the end and aim of both."

The right of Congress to adopt State legislation in a case within its constitutional power is fully recognized by the Supreme Court; and the election laws, so far as they relate to Congressional elections, are instances where the action of the State and nation "becomes blended."

Third. Congress can punish any violation of the laws enacted or adopted under the aforesaid power.

Power is expressly given to Congress by the Constitution to make all laws which shall be necessary and proper for carrying into execution all other powers granted thereto. Nearly all the criminal legislation of Congress rests upon this power.

Thus Congress has power to levy and collect taxes, duties, imports, and excises; and, as necessary and proper for carrying into execution this power, the numerous punishments found in the revenue laws were enacted. Again, Congress has power to regulate commerce; and, as necessary and proper for carrying this power into execution, the various penal provisions in the regulations established thereunder were enacted. Again, Congress has the power to establish post-offices and post-roads; and the statutes which punish the many offenses relating to the postal service were enacted, as necessary and proper for carrying into execution the last-mentioned power.

United States *vs.* Coombs, 12 Pet., 78.

United States *vs.* Fox, 95 U. S., 670.

Ex parte Jackson, *supra.*

So Congress, being invested with power to regulate the manner of holding elections for members thereof, can enforce the regulations which it may prescribe thereunder by punishing those who violate them.

United States *vs.* Quinn, 8 Blatch., 64.

United States *vs.* Anthony, 11 Blatch., 200.

United States *vs.* Hirschfield, 13 Blatch., 330.

U. States *vs.* Hendric, 2 Saw., 476, 479.

U. States *vs.* O'Neill, 2 Saw., 481.

U. States *vs.* Johnson, 2 Saw., 482.

U. States *vs.* Souders, 2 Abbott's U. S. Rep., 456.

It is competent for Congress to punish acts which have immediate relation to subjects over which it has control. In the provisions of section 5515, above quoted, Congress does not punish, or attempt to punish, violations of the State law as such, but punishes the act done by the offender as an injury to the United States. It refers to the State laws for a definition or recital of the acts of omission or commission which it makes penal, and deals with them not as violations of the State law but as violations of duty to the United States. The act may or may not be penal by the code of the State. And if penal by that code the penalty due to the United States is not measured by that imposed by the law of the State. The same act may be a violation of duty to both.

Moore *v.* Illinois, 14 How., 13.

U. States *v.* Marigold, 9 How., 560.

Fox *v.* State of Ohio, 5 How., 410.

The case of Kentucky *v.* Dennison, 24 How., 108, especially relied on by the petitioner, is not in point. In that case the court refused to compel the governor of Ohio to issue his warrant for the removal of a fugitive from justice, because the duty of delivering such fugitives

was left by the Constitution to depend on the fidelity of the State executives, and Congress was invested with no power to legislate in the premises. It is not, therefore, applicable to a case clearly within the legislative power of the Federal government. But the opinion of the court does not at all sustain the view of the law taken by the petitioner. It does recognize a well-settled principle of law under our Federal system, that neither the State nor the nation can lawfully interfere with the governmental instrumentalities of the other.

In the case of Prigg *vs.* Pennsylvania, 16 Pet., 622, a doubt was expressed whether State officers could be compelled to perform duties imposed by an act of Congress and not by the laws of the State. But even in that case the court adds that no doubt is entertained that "State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

So in the case of Kentucky *vs.* Dennison, above referred to, the court says: "It is true Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

Certainly not. But if he undertakes the performance of the duty it is not to be inferred from the opinion of the court in that case that he could not be punished for a violation of that duty.

A case more directly in point is Houston *vs.* Moore, 5 Wheat., 1, in which a law of Pennsylvania providing for the punishment of a militiaman, called into the United States service, for violating the provisions of an act of Congress, was sustained.

That, like this, was a subject within the legislative power of both State and nation. If in such a case of

"blended action" the State may punish for a violation of the Federal statute, why may not the United States punish the violation of a duty imposed by the State law?

In this case there is no interference with the instrumentalities of State government, no attempt to impose on a State officer duties not sanctioned by the State. Both the State and the nation are interested in securing purity of elections, and in their election laws "the public good is the end and aim of both." They both have laws intended to protect the ballot-box by punishing those who commit frauds upon it or violate their duty in guarding it. There is no more danger of collision in such blended legislation for this common interest than in the enactment of laws for preserving the purity or genuineness of the currency.

But the exact case before us has been dealt with in opinions to which we will refer the court. The general validity of the election laws is recognized in the following cases:

U. States *vs.* Souders, 2 Abbott's U. S. Rep., 456.
United States *vs.* Quinn, 8 Blatch., 64.
United States *vs.* Anthony, 11 Blatch., 200.
United States *vs.* Hirschfield, 13 Blatch., 330.
U. States *vs.* Hendric, 2 Saw., 476, 479.
U. States *vs.* O'Neill, 2 Saw., 481.
U. States *vs.* Johnson, 2 Saw., 482.

The principle, however, here in controversy, viz, that the violation of a duty defined by the State law, or the commission of an act forbidden by it, may be made an offense against the United States, when the same concerns an election which Congress may regulate, has been the subject of direct decision in the following cases:

U. States *vs.* Anthony, 11 Blatch., 200.

U. States *vs.* Quinn, 8 Blatch., 48.

In U. States *vs.* Anthony, just cited, the defendant was indicted and convicted in the circuit court of the United States for the northern district of New York, under the 19th section of the act of May 31, 1870 (the provision upon which the indictment was framed is embodied in section 5511 of the Revised Statutes), for knowingly voting at an election in the State of New York for a Representative in Congress without having a lawful right to vote. The trial took place before Mr. Justice Hunt and a jury.

Under the constitution and laws of the State of New York, none but males were authorized to vote at an election for members of the most numerous branch of the State legislature. It was charged that the defendant had voted at said election when, being a woman, she had no right to vote. The defense was that the constitution and laws of New York, limiting the right to vote to persons of the male sex, were in violation of the fourteenth amendment of the Constitution of the United States.

After adverting to the rights and privileges secured and protected by the fourteenth and fifteenth amendments of the Constitution of the United States, with citation of authorities bearing thereon, Justice Hunt, in the opinion delivered by him in that case, says:

"The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the State, and not under the Constitution of the United States. The qualifications are different in the different States. Citizenship, age, sex, residence, are variously required in the different States, or may be so. If the right belongs to any particular person, it is because

such person is entitled to it by the laws of the State where he offers to exercise it, and not because of citizenship of the United States. * * *

"The United States rights appertaining to this subject are those, first, under article 1, section 2, subdivision 1, of the United States Constitution, which provides that electors of Representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature; and second, under the fifteenth amendment, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' If the legislature of the State of New York should require a higher qualification in a voter for a Representative in Congress than is required for a voter for a member of the house of assembly of the State, this would, I think, be a violation of a right belonging to a person as a citizen of the United States. *That right is in relation to a Federal subject or interest*, and is guaranteed by the Federal Constitution. The inability of a State to abridge the right of voting on account of race, color, or previous condition of servitude arises from a Federal guaranty. Its violation would be the denial of a Federal right; that is, a right belonging to the claimant as a citizen of the United States. This right, however, exists by virtue of the fifteenth amendment. If the fifteenth amendment had contained the word 'sex,' the argument of the defendant would have been potent. * * * The legislature of the State of New York has seen fit to say that the franchise of voting shall be limited to the male sex. In saying this, there is, in my judgment, no violation of the letter or of the spirit of the fourteenth or of the fifteenth amendment. * * * The fourteenth amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of law. * * * She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law" [the act of Congress under which she was indicted].

In U. States *vs.* Quinn, *supra*, the defendant was indicted and convicted in the circuit court of the United States for the southern district of New York, under the 20th section of the act of May 31, 1870 (which is embodied in sections 5512 and 5513 of the Revised Statutes), providing for the punishment of persons who illegally register, or attempt to register, at a registration of voters for an election for a Representative in Congress, and declaring that a registration made under the laws of a State shall be deemed a registration within that act. The case was before Judges Woodruff and Blatchford, and on demurrer to the indictment the question of the validity of the law on which it was founded arose. The validity of the law was sustained, the court holding that authority to enact it is derivable from article 1, section 4, and article 1, section 8, of the Constitution of the United States. "The act in question," observed Judge Woodruff in delivering the opinion of the court, "neither professes nor, by any implication, can it, we think, be construed to affect the qualification of any elector anywhere. It imposes no duty to register. It prohibits no registration that is required in the State in which the elector seeks to exercise his franchise. It touches no qualification of the elector in any other respect. It leaves the power of the State to prescribe the qualifications of electors for the most numerous branch of the State legislature, in the largest and fullest extent, untouched and unaffected. It says, and only says, that, when the qualification of registration is imposed by the State law (leaving the expediency or wisdom of such law entirely to the judgment of the State), it shall be an offense against the laws of the United States to contribute, by fraud and violation of the State registry laws,

to the sending of a Representative to the Congress of the United States who is not clothed with the authority which a true expression of the popular will would give; and that is all."

This was not the case of a State officer. The principle does not vary when applied to State officers. These cannot be compelled to perform a duty for the United States if forbidden by the State. It would be in the power of the States to force the United States to provide the entire machinery for Congressional elections. They have not done so. They have provided officers whom they have consented shall, and whom they have enjoined to, perform a duty alike to the State and the United States, who conduct the election in harmony and together. When the State officer acts under such circumstances, and by an act which each has forbidden violates his duty to each, it is not an answer on his part that he could not have been compelled by the United States against the will of the State to conduct the Congressional election. He has acted by his own consent and that of his State. If he has violated a duty thus imposed he has no cause of complaint that he has thus subjected himself to a penalty from the United States.

See U. States *vs.* Given, 17 Int. Rev. Record, pp. 189, 195.

In that case the defendant was indicted in the United States circuit court for the district of Delaware, under the 4th section of the act of May 31, 1870 (16 Stat., 140). At the trial (which was before Justice Strong and Judge Bradford) a verdict of guilty was returned, and it was moved in arrest of judgment that the statute on which the indictment was framed was unconstitu-

tional; but the motion was overruled. The following, taken from the opinion delivered by Justice Strong on that occasion (*Ibid.*, 190), has a direct bearing upon the subject here discussed:

The remaining reason advanced in support of the motion in arrest of judgment is, "that the defendant, being an officer of the State of Delaware, with no powers or duties but such as were prescribed by the constitution and laws of said State, is amenable only to said constitution and laws for any non-performance thereunder." If by this is meant that a State officer, or a person deputed to perform duties on behalf of a State, is not amenable to the laws of the United States, that he owes no duties to such laws, and that he is not punishable for violation of them, I cannot assent to it. I agree that Congress cannot impose upon State officers, as such, Federal duties; but I fail to perceive that the act of 1870 has imposed any new duties upon any State officer. It is, I think, an exploded heresy that the national government cannot reach all individuals in the States. It cannot invade the State domain. It cannot take cognizance of offenses against State sovereignty. But when State laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the Federal government (as, for example, to vote, the right of citizenship, or the right to vote, so far as it is secured), I have no doubt that Congress may make the non-performance of those duties an offense against the United States, and may punish it accordingly. This is not invading the State domain. It has no reference to violations of State laws. They remain punishable in the State courts. Undoubtedly, an act, or an omission to act, may be an offense both against the State law and the laws of the United States. Any other doctrine would place the national government entirely within the power of the States, and would leave constitutional rights guarded only by the protection which each State might choose to extend to them.

Judge Bradford, in the same case (*Ibid.*, p. 196), uses the following language:

> The statute of the United States, then, under which this indictment was drawn, not only made a rule of action superadded to that which was created by the State, but created a penalty, not for violating a State law, for that it could not punish, but for violating a United States law, or law protecting the constitutional rights of citizens of the United States. The fact of duty to State authority did not absolve the State official from duty to United States authority. The law-making power took these individuals just as it found them, * * and imposed a duty by way of punishment for the non-performance, impartially and fairly, of what was already required of them by State authority; they created no new duty, added no new act to be performed, made no new scheme, plan, or policy different or other from that already required of the State officer; but only commanded him, as his action was vital to the exercise of right by the American citizen, to do impartially and fairly his duty.

Upon the foregoing considerations it is submitted that the application of the petitioner for the writ of *habeas corpus* should be denied.

CHARLES DEVENS,
Attorney-General.